91-878 (1)

No. _____

In The

Supreme Court of the United States

October Term, 1991

JOHN JOYNER, ET AL.,

Petitioners,

v.

RUBY HEWITT, ET AL.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeal For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the principles of federalism require a federal Court to abstain from ordering a subdivision of the state to divest itself of title to a public park and thirty-six (36) statutes, when the federal Court relies exclusively on the religion sections of the state Constitution, provisions which do not parallel the federal Constitution, thus leaving state authorities without recourse to their own state Supreme Court for a definitive interpretation of the state Constitution, on unique facts requiring the balancing of important and sensitive legal issues regarding public preservation of works of art, religious liberty, and divestiture of public property.

2. Whether Rule 52 of the Federal Rules of Civil Procedure prohibits the U.S. Court of Appeals from materially changing the factual findings in a case in order to apply a different legal standard, without making any ruling that the District Court's contrary findings are erroneous; to wit, recharacterizing as merely religious "symbols," and therefore unconstitutional, thirty-six (36) statutes which the U.S. District Court found to be "artistic works" of significant aesthetic, cultural and historical value, and worthy of preservation constitutionally.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners request that the United States Supreme Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

[1] The parties to this case are the Petitioners herein, Defendants and Appellees below, John Joyner, Robert Hammock, Jon D. Mikels, Barbara Riordan and Larry Walker, in their official capacities as members of the San Bernardino County Board of Supervisors, and the Yucca Valley Parks and Recreation District, an agency of the County; and the Respondents herein, Plaintiffs and Appellants below, Ruby Hewitt, Ralph Winant, Jerry Weitzman, Darrell Barker and Dennis Malloy.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (Appendix A) is reported at 940 F.2d 1561 (9th Cir. 1991). The decision of the U.S. District Court (Appendix B) is reported at 705 F.Supp. 1443 (C.D.Cal. 1989).

JURISDICTION

The opinion of the Court of Appeals (Appendix A) was entered on July 31, 1991. A Petition for Rehearing was denied on August 29, 1991 (Appendix D). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Article I, §4, of the California Constitution provides in pertinent part:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace of safety of the State. The Legislature shall make no law respecting an establishment of religion.

2. Article XVI, §5, of the California Constitution provides in pertinent part:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund

> whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose. . . .

3. Article I, §24, of the California Constitution provides in pertinent part:

> Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

4. Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

STATEMENT OF THE CASE

Relying exclusively on two sections of the California Constitution concerning freedom of religion, the Ninth Circuit Court of Appeals, reversing the U.S. District Court, has declared that the County of San Bernardino is legally prohibited from owning and maintaining a public park donated to the County by the estate of a noted local artist and containing thirty-six (36) statues depicting biblical characters.

The District Court found the statues to be unique and valuable works of art of significant historical, artistic, cultural and economic value to the local community, and

ruled that their preservation did not violate the California (or the United States) Constitution.

These statues were donated *in situ* to the County and were not commissioned by any public entity (TP 134:22-24, 135:5-7).

From 1953 until his death in 1961, the sculptor Antone Martin lived on a piece of desert property he owned in Yucca Valley, in the County of San Bernardino, California, and devoted his life to the creation of unique works of sculpture. After his death, the beneficiaries of his estate donated the property, with approximately 36 works of sculpture on it, to the County of San Bernardino (TP 62:13-63:5).

The statues are located in a park 65 miles from the County seat, with no government buildings associated with the park (TP 83:11-85:6).

These unusual statues depict biblical characters and are arranged in scenes from New Testament stories. The statues are not labeled (TP 46:20-25, 103:15-20).

The statues are massive. They range from 4 to 16 tons each, plus a bas-relief replica of Leonardo da Vinci's "The Last Supper" painting which weighs 125 tons (Plaintiffs' Exhibit 1, ER 1-2). The statues are original creations of the artist, formed of reinforced steel and concrete, fastened to a concrete and steel support below ground, covered with a molded form of concrete, shaped by the artist using primarily his hands and hand tools, and finally coated with a secret form of glazing which he developed himself to smooth and protect the surface of his statues from the

harsh desert conditions of wind, heat and sunlight (TP 136:22-137:16; Plaintiffs' Exhibit 1, ER 1-2).

Because of their size, weight, attachment to the ground, and their grouping into multiple statue tableaus, the sculptures are effectively immovable (TP 133:21-134:3).

These art works and park are preserved by the County for historical (TP 133:10-12), artistic (TP 133:13-17), cultural (TP 133:13-20, 136:8-21), and economic (TP 135:18-25; Plaintiffs' Exhibit 1, ER 1) reasons. As many as 40,000 persons in a single year have visited the park statues.

The park and statues have not been used for religious meetings or religious ceremonies.

Under the First Amendment of the United States Constitution, government entities may, and do, in fact lawfully purchase, display and maintain works of art reflecting religious themes and characters. Literally hundreds of such works of art depicting religious content are now on display in the National Gallery of Art alone.

> Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, and the Resurrection, among many others with explicit Christian themes and messages. The very chamber in which oral arguments on this case were heard is decorated with

> a notable and permanent – not seasonal – symbol of religion: Moses with Ten Commandments.
>
> There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. . . .

Lynch v. Donnelly (1984) 465 U.S. 668, 676-678.

The California Supreme Court has not decided the issue under the California Constitution.

Various state laws preserve other works of art and architecture having religious significance. At least forty-two (42) publicly owned religious sites, including works of art and architecture having religious themes, are owned, preserved and displayed by government entities in the State of California, including the state itself, pursuant to various landmark and historic preservation laws and other authority. See the *California Inventory of Historic Resources* (State of California, Resources Agency, Department of Parks and Recreation, 1976). The District Court took judicial notice of this state publication (TP 140:20-141:1, 148:14-149:11), but it was not addressed by the appellate court. These sites include several Catholic missions (with altars and religious statuary) and other Catholic sites, Chinese ancestral temples, prehistoric Indian religious art, Protestant churches, a Jewish synagogue, Jewish cemeteries, and nondenominational churches.

The preservation of such works of religious art and architecture is specifically authorized by California law: State Historical Landmarks Program, Public Resources Code §5021; Mills Act, Government Code §§50280-50290;

Marks Historical Rehabilitation Act of 1976, Health and Safety Code §§37600-37684; State Historic Building Code, Title 24, California Administrative Code, Part 8. See *California Heritage Task Force: A Report to the Legislature and People of California* (Sacramento, 1984), pp. 105-109. See *California Inventory of Historic Resources*, above.

Building a museum to enclose the site, and purchasing other art works to display alongside these statues, is not practicable. Objectivity and neutrality have been obtained by other means, by not using the park for religious meetings, by giving the park a neutral name (the Antone Martin Memorial Park), by leaving the statues unlabeled, by preparing brochures that neutrally present the identification of the statues, by policing the area to prevent religious literature from being left at the site by others, by building a boundary fence separating the park property from adjacent church property, by placing signs at the park calling attention to the secular purposes for the park and statues. The County remains willing to take other financially feasible measures to preserve this park and to display these unique statues in an objective and neutral manner.

JURISDICTION IN THE U.S. DISTRICT COURT

Plaintiffs asserted jurisdiction in the federal courts on the grounds of 28 U.S.C. §§1331, 1343(3), 2201, 2202; 42 U.S.C §1983; and pendant jurisdiction (First Amended Complaint, ¶2).

REASONS FOR GRANTING THE PETITION

The Court of Appeals has violated the principles of federalism in this case and has promulgated a rule of federal court intervention into the interpretation of state constitutions which conflicts with U.S. Supreme Court precedents and the practice of other federal circuits.

I. RESPECT FOR FEDERALISM REQUIRES THAT FEDERAL COURTS DEFER TO STATE SUPREME COURTS TO INTERPRET PROVISIONS OF STATE CONSTITUTIONS WHICH DO NOT PARALLEL THE FEDERAL CONSTITUTION, ON FACTS WHICH REQUIRE BALANCING OF IMPORTANT COMPETING PUBLIC VALUES, SUCH AS PUBLIC PRESERVATION OF ART, RELIGIOUS LIBERTY, AND COURT-ORDERED DIVESTITURE OF PUBLIC PROPERTY.

The Court of Appeals has ventured to interpret the religion sections of the California Constitution, which have no counterpart in the federal Constitution, and to apply its interpretation to a unique set of facts in an area of law and public policy that requires balancing of important and delicate public values.

Acting exclusively on the authority of its interpretation of the religion sections of the California Constitution, the Court of Appeals has ordered the County of San Bernardino to divest itself of ownership of a public park because it contains works of art depicting biblical characters. This order leaves the County of San Bernardino with no recourse to the California Supreme Court to review this interpretation of the state Constitution.

Determination of the state constitutional issues in this case requires balancing sensitive areas of law and public policy: public ownership and preservation of works of art, principles of religious liberty, and divestiture of public property (a public park and 36 statues).

The striking of a balance of these values under the state Constitution is an authority properly reserved to the state Supreme Court, especially when the state constitutional provisions involved have few decisions interpreting them, when these decisions express clearly that the scope and application of the state Constitution differs from the federal Constitution, and when the language of the state Constitution does not parallel the language of the federal Constitution.

Prudential doctrines to preserve comity and federalism have been developed by this Supreme Court and the other federal circuits to prevent federal courts from supplanting state Supreme Courts as the final interpreters of state law and, especially, state constitutions. The intervention of the U.S. Supreme Court is sought to restore the judicial safeguards rejected by the present case.

The principles of federalism properly require that the case be remanded to the District Court with instructions to abstain from deciding the state constitutional issues and to grant Petitioners' leave to pursue an action in the state courts and to present these state constitutional issues to the California Supreme Court for resolution.

In denying the Petitioners' request for rehearing, the Court of Appeals rejected the County's request for abstention and for remand to permit the determination of these state constitutional issues in the California courts.

A. *PULLMAN* ABSTENTION

When a federal action touches sensitive areas of state policy, and involves the construction of uncertain provisions of state law, especially the state Constitution, the federal courts should invoke *Pullman* abstention and remand the matter to the U.S. District Court to hold the case while the parties obtain resolution of their state claims in the state courts. *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941); *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959); *Louisiana Power & Light Company v. City of Thibodaux*, 360 U.S. 25 (1959); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *Askew v. Hargrave*, 401 U.S. 476, 478 (1971); *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975).

This policy is based upon two principles of federalism. One, when the determination of a case "touches a sensitive area of social policy" then "the federal courts ought not to enter unless no alternative to its adjudication is open." *Pullman, supra*, at 498. "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies." *Id.*, at 500. "Federal courts . . . restrain their authority because of 'scrupulous regard for the rightful independence of the state governments.' " *Id.*, at 501, citation omitted.

Two, a definitive interpretation of state law can be made only by the state courts. "But no matter how seasoned the judgment of the district court may be, it cannot escape being a forecast rather than a determination. The last word on the meaning of . . . [Texas law] in this case,

belongs neither to us nor to the district court but to the supreme court of Texas." *Pullman, supra,* at 500.

The federal courts should exercise *Pullman* abstention in this case.

First, the decision in this case touches "sensitive areas of social policy." Two more volatile constitutional topics could hardly be imagined than public ownership of works of art and the scope of state protections concerning religion. This action involves both, with the additional controversy of federal court control over state or local government property. Under *Pullman* and subsequent cases, the federal courts should remand this case for state court determination of the California Constitution issues involved.

The preservation of state-owned property, the definitive construction of the state Constitution, the determination of the limits on religious and artistic expression under the state Constitution – such fundamental prerogatives of self-government by the citizens of California under their state Constitution must not be compromised by the refusal of the Ninth Circuit to accord the state the liberty to interpret its own Constitution as mandated by a proper respect for the principles of federalism.

The federal court is ordering a subdivision of the state to surrender title to real property, a public park, and to divest itself of ownership of 36 works of art, exclusively on the grounds that public ownership of the park and its statues violates the state Constitution. Respect for federalism requires that the state, through its courts, be permitted to decide for itself whether a subdivision of the

state is required to give up public lands because of provisions of the state Constitution.

Second, the case involves unsettled questions of interpretation of the California Constitution, and not just the Constitution but two of the most important provisions of the Constitution, the religion sections. Neither of these sections parallels the federal Constitution.

> "The proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals. . . . "
>
> The *Pullman* doctrine was based on "the avoidance of needless friction" between federal pronouncements and state policies. The instant case is the classic case of that tradition, for here the nub of the whole controversy may be the state constitution. . . .
>
> We think the federal court should have stayed its hand while the parties repaired to the state courts for a resolution of their state constitutional questions.

Reetz v. Bozanich, 397 U.S. 788, 789, 790 (1970) (Alaska Constitution); citation omitted. Accord: *Harris County Commissioners, supra* (Texas Constitution).

The California Supreme Court itself is sharply divided over the interpretation of the religion sections of the state Constitution. In a recent case involving invocations at public high school graduation ceremonies the seven-member California Supreme Court divided three ways – three justices ruling that the invocations violated both the state and federal Constitutions, two ruling that

they violated neither the state nor the federal Constitution, and two ruling reluctantly that they probably violated the federal Constitution and declining to rule on the state Constitution. *Sands v. Morongo Unified School District*, ___ Cal.3d ___, 281 Cal.Rptr. 34 (1991). If the state Supreme Court justices are so divided over the religion sections of the state Constitution, the federal appellate court can only guess at their meaning.

The Court of Appeals ignored its own cases requiring abstention when the state law issues are unclear, *Manney v. Cabell*, 654 F.2d 1280, 1283 (9th Cir. 1980); or involve issues of state policy broader than the case alone, *Ripplinger v. Collins*, 868 F.2d 1043 (9th Cir. 1989); *American International Underwriters v. Continental Insurance*, 843 F.2d 1253 (9th Cir. 1988); *California Republican Party v. Mercier*, 652 F.Supp. 928 (C.D.Cal. 1986); *Ganz v. City of Belvedere*, 739 F.Supp. 507 (N.D.Cal. 1990).

No federal court can predict how the state Supreme Court would balance the interests of artistic expression, cultural preservation, religious liberty, and public property rights presented in this case. Moreover, the rule of law produced by this case could influence the fate of the California missions and over 40 publicly owned sites, artifacts and works of art and architecture of religious significance in the state.

The Court of Appeals concedes that "religious artwork" presents a "difficult problem" legally. Opinion, App. A-17. Due to the unique and nonrecurring nature of such a gift to the public of a park containing immovable statues depicting biblical characters, if the federal courts do not abstain, the state Supreme Court will never have

the opportunity to rule on the exact issues in this case. On the broader issues of cultural and artistic preservation versus potential for religious establishment or preference, this federal court decision unavoidably will be cited as precedent to influence the actions of public bodies for many, many years before another case raising these issues is likely to arise again and to give the state Supreme Court an opportunity to distinguish or reject the opinion of the Court of Appeals in this case and to articulate the actual balance of these public values as comprehended in the California Constitution.

The unsettled status of the interpretation of the California Constitution as applied to the unique facts of this case makes this a proper case for abstention. Petitioners are entitled to a definitive resolution of the state constitutional issues in this case by the California Court of Appeal or Supreme Court. *Harris County Commissioners Court v. Moore* 420 U.S. 77, 88-89.

The very cases relied upon by the Court of Appeals express the unsettled nature of California constitutional law regarding public preservation and display of religious art. For example, the Court of Appeals comments on and then quotes *Okrand v. City of Los Angeles,* 207 Cal. App.3d 566, 254 Cal.Rptr. 913 (1989) (a state appellate court decision finding no violation of the California Constitution in the display of a religious menorah in the rotunda of the Los Angeles City Hall):

> The *Okrand* court . . . held that because there are few state cases addressing free exercise and establishment of religion, a state court "may 'also consult principles of federal cases as they

> seem compelling guides to uncharted state grounds.' "

Opinion, App. A-13, citation omitted.

Thus, the issue of display of religious art is admittedly "uncharted state grounds" for which there are "few state cases" for guidance. The novelty of the issues and the paucity of state constitutional precedents virtually trumpet the appropriateness for abstention to permit the state Supreme Court to interpret the state Constitution on religious art.

The authorization that state courts "may" consult federal cases "as they seem compelling guides to uncharted state grounds" does not authorize federal courts to decide such "uncharted state" constitutional cases for themselves. The authorization (a) applies to state, not federal, courts; (b) it requires a preliminary judgment by the state court judges as to whether the state constitutional precedents are sufficient; (c) and it leaves to the judgment of the state courts as to which federal principles "seem compelling guides" to state constitutional provisions.

Indeed, the very use by the Court of Appeals of federal decisions in purporting to decide this case exclusively on state constitutional grounds constitutes a concession that the state Constitution on this subject is "uncharted state grounds" and needs a definitive interpretation by the state Supreme Court.

The analysis of the Court of Appeals bristles with pointed problems in its purported construction of the California Constitution and cases.

For example, the Court relies upon the "plurality" opinion (three justices) in *Sands v. Morongo Unified School*

District, ___ Cal.3d ___, 281 Cal.Rptr. 34 (1991) for the scope of the state constitutional protection of "separation of church and state," and then concedes in a footnote that the case was decided on the basis of the federal, not the state, Constitution, and that the justices were divided three ways over the applicability of the state Constitution in the case. Opinion, App. A-12, note 10.

The Court notes that with regard to religion, "California's constitutional provisions are more comprehensive than those of the federal [c]onstitution." Opinion, App. A-13, citation omitted. But the Court does not acknowledge the prerogative of the state Supreme Court to determine how much, and in what areas and application, the state Constitution is more comprehensive than the federal Constitution. By contrast, for example, the Court of Appeals concedes that "In the California Constitution there is no requirement that each religion always be represented." *Fox v. City of Los Angeles*, 22 Cal.3d 792, at 795, 150 Cal.Rptr. 867 at 868 (1978).

The dichotomy asserted by the Court of Appeals between art and religious symbols does not comport with California constitutional law. In *Okrand v. City of Los Angeles*, 207 Cal.App.3d 566, 254 Cal.Rptr. 913, the Court held that the Katowitz menorah, an artifact of "high religious significance" could nevertheless be displayed in the rotunda of the Los Angeles City Hall.

> "The fact [the menorah] also has high religious significance to Jews does not mean its display does not also provide cultural and educational development to the citizenry at large."

207 Cal.App.3d at 574.

The Antone Martin Memorial Park does not have th "direct, immediate and substantial effect of advancing religion" required for an Article XVI, § 5, violation. *California Educational Facilities Authority v. Priest* (1974) 12 Cal.3d 593, 604, 116 Cal.Rptr. 361, 369, and note 12. Whatever benefit there may be to religion in the preservation of this art, it is an effect incidental to the primary historical, artistic, cultural and economic purposes.

The case of *Frohliger v. Richardson* (1923) 63 Cal.App. 209, 218 P. 497 (prohibiting public funds for the restoration of the San Diego mission), differs materially from the present case in that the San Diego mission at that time was still being controlled by religious authorities and used for religious services. Hence, public funding would have gone directly to finance religious worship and sectarian purposes, in violation of the Constitution. In the present case, the park and statues are not used for religious meetings or other religious purposes.

The Court of Appeals' citations to the opinion in *County of Los Angeles v. Hollinger* (1963) 221 Cal.App.2d 154, 34 Cal.Rptr. 387, is likewise inapposite to the present facts. In that case the court disapproved direct grants of public funds to produce a religious parade and a religious film. These would have had the "direct, immediate and substantial effect of advancing religion" prohibited by the Constitution. *Priest, supra,* at 12 Cal.3d 604.

Third, abstention is "required" under Supreme Court jurisprudence when the issues present "an integrated scheme of related constitutional provisions. . . . " *Harris County Commissioners, supra,* at 420 U.S. 84, note 8; citing *Reetz, supra,* and *City of Meridian v. Southern Bell Tel. & Tel.,* 358

U.S. 639 (1959). The California Constitution contains two separate articles potentially relating to the facts of this case, each of which contain multiple integrated clauses, Article 1, § 4, and Article 16, § 5, *supra*. The questionable application of these constitutional provisions emphasizes the wisdom of requiring abstention in cases of interrelated constitutional provisions.

Fourth, the California Constitution requires that it be interpreted independently from the federal Constitution.

> Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution.

Article I, §24. "Although federal cases may supply guidance for interpreting this provision [Article I, §4, one of the state Constitution religion clauses], California courts must independently determine its scope." *Sands v. Morongo Unified School District*, ___ Cal.3d ___, 281 Cal.Rptr. 34, 45 (1991).

In violation of the California Constitution and its own purported independent state grounds interpretation, the Court of Appeals imposed federal First Amendment principles upon the religion sections of the state Constitution.

The Court of Appeals opinion emphasizes that its conclusion rests upon a "pivotal" distinction between displaying works of religious art in a museum rather than a park.

> [T]he essential difference between the County's park and a public museum is pivotal to our conclusion that the County's ownership violates the California Constitution.

Opinion, App. A-16.

This "museum vs. park" distinction arises, if at all, in First Amendment cases, not California constitutional cases. For this distinction the Court of Appeals cites *Lynch v. Donnelly*, 465 U.S. 668 at 692 (1984), a U.S. Supreme Court decision arising out of Rhode Island and based on the First Amendment. Opinion App. A-16. The Court further discloses the federal orientation of its rationale in the next sentence:

> However, every religions display that is put in an "artistic" form, such as painting or sculpture, instead of the "mannequin-like" form of the creche or cross is not saved from *First Amendment* scrutiny.

Opinion, App. A-16, emphasis added. The paradigm employed by the Court of distinguishing between museums and parks for display of religious art is a federal First Amendment construct (itself of doubtful validity) imposed upon the California Constitution. The Court of Appeals goes on to use this museum-park contrast to examine California cases, disregarding that these California cases do not make the distinction which is being imposed upon them from the federal cases.

Although purporting to decide exclusively on the basis of the California Constitution, the Court of Appeals derives controlling substantive principles from federal decisions having no basis in the California Constitution. (a) *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Opinion, App. A-11 (text and footnote 9) and A-15; (b) *Lynch v. Donnelly*, 465 U.S. 668 (1984), Opinion, App. A-15, A-16; (c) *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086, Opinion, App. A-19.

Fifth, the Court of Appeals cites its own decision in *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985) for the proposition that, "[F]ederal constitutional issues should be avoided even when the alternative ground is one of state constitutional law." Opinion, App. A-8. Actually, *Carreras* better illustrates why the federal courts should abstain from attempting to interpret the California Constitution under the unique and significant facts of this case. In *Carreras* the Court properly declined *Pullman* abstention because the meaning of the California Liberty of Speech Clause had been thoroughly litigated and was clear. In *Carreras* the Court applied Article I, § 2, of the California Constitution, but only after numerous decisions by the California Supreme Court and a long series of prior and carefully reasoned cases: *Schwartz-Torrance Investment Corporation v. Bakery and Confectionery Workers' Union* (1964) 61 Cal.2d 766, 40 Cal.Rptr. 233; *In Re Hoffman* (1967) 67 Cal.2d 846, 64 Cal.Rptr. 97; *In Re Lane* (1969) 71 Cal.2d 872, 79 Cal.Rptr. 729; *Diamond v. Bland [Diamond I]* (1970) 3 Cal.3d 653, 91 Cal.Rptr. 501; *Diamond v. Bland [Diamond II]* (1974) 11 Cal.3d 331, 113 Cal.Rptr. 468; *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 153 Cal.Rptr. 854, affirmed, *Pruneyard Shopping Center v. Robins*, (1980) 447 U.S. 74; *Press v. Lucky Stores, Inc.* (1983) 334 Cal.3d 311, 193 Cal.Rptr. 900; *H-CHH Associates v. Citizens For Representative Government* (1987) 193 Cal.App.3d 1193, 238 Cal.Rptr. 841; *Northern California Newspaper Organizing Committee v. Solano Associates* (1987) 193 Cal.App.3d 1644, 239 Cal.Rptr. 227. This line of cases also had been reviewed and affirmed by the United States Supreme Court. *Pruneyard Shopping Center v. Robins* (1980) 447 U.S. 74.

No such line of cases and resultant constitutional clarity exists concerning the interpretation of the religion sections of the state Constitution in the present case.

Finally, federal courts have power to hear pendant state claims. *Mine Workers v. Gibbs*, 383 U.S. 715 (1966). But federal courts should relinquish jurisdiction when "state issues substantially predominate." *Gibbs* at 726; *Carnegie-Mellon University v. Cohill*, 108 S.Ct. 614, 619, note 7 (1988).

In the present action, the Court of Appeals has decided the case exclusively on the basis of the California Constitution. Hence, "state issues substantially predominate" in this case at its present stage, and the case should be remanded for determination of the state constitutional issues in the state courts.

B. CONFLICT AMONG THE CIRCUITS

A conflict exists among the circuits concerning the duty of the federal courts to abstain from interpreting state Constitutions when their language does not parallel the language of the federal Constitution.

The Court of Appeals in this action asserts a duty to interpret the religion sections of the California state Constitution even though those provisions do not parallel the federal Constitution. This duty, however, is contradicted by decisions from the other circuits.

The Court of Appeals makes an unqualified assertion that:

> [F]ederal constitutional issues should be avoided even when the alternative ground is one of the state constitutional law.

Opinion, App. A-8, quoting *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985). This unqualified assertion of federal authority to interpret state constitutions overstates the law and omits important limitations on this authority mandated by the principles of federalism.

The rule among the federal circuits outside the 9th Circuit is that the federal courts should not interpret the provisions of state constitutions that do not parallel the language of the federal Constitution or that may parallel the language of the federal Constitution but which have been interpreted independently by the state courts. *Fields v. Rockdale County Georgia*, 785 F.2d 1558 (11th Cir. 1986), cert. den. 479 U.S. 984; see also *National Capital Naturists, Inc. v. Board of Supervisors of Accomack County*, 878 F.2d 128 (4th Cir. 1989).

The U.S. Supreme Court decisions support this rule. E.g., *Harris County Commissioners Court v. Moore*, 420 U.S. 77 (1975); *Reetz v. Bozanich*, 397 U.S. 82 (1970); *City of Meridian v. Southern Bell Tel. & Tel. Co.*, 358 U.S. 639 (1959).

The Court of Appeals in the present case would establish a contrary rule in the Ninth Circuit, permitting federal courts to construe state constitutional provisions that do not parallel the federal constitution or which possess independent state interpretations that vary from their federal counterparts.

II. THE COURT OF APPEALS ENGAGED IN A DE NOVO REVIEW NOT ONLY OF THE LAW OF THE CASE BUT OF THE FACTS, IN VIOLATION OF FEDERAL RULES OF CIVIL PROCEDURE, RULE 52(a).

Having no basis for a ruling that the findings of the District Court are erroneous, the Court of Appeals

nevertheless converts the statues from art into "symbols of worship," a "static collection of Christian symbols" and a "religious display" in order to rule them unconstitutional. Opinion, App. A-17, A-26.

This factual metamorphosis controls the outcome of the case. The Court of Appeals concedes that if the determination of the District Court that the statues are indeed art is permitted to stand, then the statues can be preserved constitutionally.

> Neither the California nor the United States Constitution prohibit [sic] governments from preserving their cultural and artistic heritage. However, the argument that a religious display is art or a tourist attraction will not protect the display from the restrictions on government-sponsored religion which the people of California have put in their constitution.

Opinion, App. A-26.

Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein.

See *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984).

The District Court held emphatically that the statues are art, having cultural, aesthetic and historical value. The District Court refers to the statues as having "artistic, cultural and historical significance," "cultural, artistic and economic benefits," "cultural, historical and artistic

value," as being capable of evoking "cultural appreciation," and as representing "art and culture." Decision, App. B-10, B-15. The trial Court found that, "Overall, these sculptures are artistic works of an aesthetically pleasing nature, created by a skilled professional sculptor of local note." Decision, App. B-15.

> The fact that the statues and tableaus are religious in nature, however, does not diminish the apparent artistic qualities of the statuary.

Decision, App. B-15.

The Court of Appeals takes a different view of the facts:

> However, every religious display that is put in "artistic" form, such as painting or sculpture, instead of the "mannequin-like" form of the creche or cross is not saved from First Amendment scrutiny.

Opinion, App. A-16.

CONCLUSION

The Court of Appeals in this case has gone outside the bounds of judicial authority and threatens to establish a precedent for other federal courts in the Ninth Circuit to take liberties with state constitutions and with the facts of delicate cases. Petitioners request that the U.S. Supreme Court issue a writ of certiorari to the Ninth Circuit to review this case for the purpose of remanding it to the state courts for interpretation of the religion clauses of the California Constitution in the context of

public preservation of works of art, and thereby to prevent the unwarranted court-ordered divestiture by Petitioner County of San Bernardino of the Antone Martin Memorial Park.

Respectfully submitted,

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUBY HEWITT; RALPH WINANT; JERRY WEITZMAN; DARRELL BARKER and DENNIS MOLLOY *Plaintiffs-Appellants,* v. JOHN JOYNER; ROBERT L. HAMMOCK; JON D. MIKELS; BARBARA C. RIORDAN; and LARRY WALKER, in their official capacities as members of the San Bernardino County Board of Supervisors; YUCCA VALLEY PARKS AND RECREATION DISTRICT, *Defendants-Appellees.*	No. 89-55199 D.C. No. CV-87-7605-DWW OPINION

Appeal from the United States District Court
for the Central District of California
David W. Williams, District Judge, Presiding

Argued and Submitted
December 6, 1990 – Pasadena, California

Filed July 31, 1991

Before: Warren J. Ferguson, William A. Norris and
David R. Thompson, Circuit Judges.

Opinion by Judge Ferguson

COUNSEL

Carol A. Sobel, ACLU Foundation of Southern California, Los Angeles, California, for the plaintiffs-appellants.

David L. Llewellyn, Jr., Sacramento, California, for the defendants-appellees.

Douglas E. Mirell, Los Angeles, California, for the amicus, American Jewish Congress; Daron L. Tooch, Los Angeles, California, for the amicus, Anti-Defamation League of B'nai B'rith.

OPINION

FERGUSON, Circuit Judge:

Plaintiffs-appellants, five residents of San Bernardino County, appeal the district court's judgment in favor of the defendants-appellees after a one-day bench trial. The defendants are the Yucca Valley Parks and Recreation District and members of the San Bernardino County Board of Supervisors.[1] The plaintiffs sought declaratory and injunctive relief, contending that the County's ownership and maintenance of a public park containing exclusively immovable religious statuary depicting scenes from the New Testament violate the Establishment Clause of the first amendment of the United States Constitution and analogous provisions of the California Constitution. We hold that the district court erred in finding that the County's ownership of the park does not violate the California Constitution, and reverse. We do not adjudicate the federal issues.

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[1] This opinion will refer to the defendants collectively as the "County."

I.

San Bernardino County currently owns and maintains Antone Martin Memorial Park, a 3.5 acre park located in Yucca Valley, a county subdivision. The park contains 36 immovable statues and tableaus which are scattered among indigenous Joshua trees and cottonwoods. The statues are arranged in several groupings which depict the story of the life of Christ as told in the New Testament. They are made of solid concrete and are anchored to the ground by an underground block of cement. Each statue weighs from 4 to 16 tons, except for the Last Supper Facade, which is estimated to weigh 125 tons.

A brochure at the park states that the park was "[s]tarted in 1951 by the Reverend Eddie Garver, the 'Desert Parson' of Yucca Valley, with one huge statue depicting Christ." Antone Martin lived on the park site from 1953 until his death in 1961. During that time, he created the larger-than-life white concrete statuary representing various biblical scenes.[2] Upon his death, his heirs donated the property to the County by a deed containing a reversionary clause requiring that the County preserve the biblical statuary at the park. Since 1961, the County has maintained the property as a public park.

After accepting the park, the County dedicated it as Desert Christ Park, printed brochures which identified each of the statuary scenes by reference to Bible passages,

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[2] Photographs of the statuary which were admitted as exhibits in the district court are reproduced here in the appendix to this opinion.

and put an ad in the telephone directory advertising the park as a "World Famous Theme Park . . . depicting the life of Christ." Picnic tables, parking and restrooms have been provided for the public's use. The Yucca Valley Parks and Recreation District is responsible for maintenance of the park, and spends $5,500 annually on the park. A portion of this money comes from the San Bernardino County General Fund.

The park property adjoins that of the Evangelical Free Church. Statues by Antone Martin are also located on church grounds and are described in the County's brochure as part of the park.[3] In fact, the largest of the park's statues, the Last Supper tableau, straddles the property line of the church and the park. A large cross located on church property overlooks the park from a hillside. Until this litigation was initiated, the County had made no effort to demarcate the park's property line. In addition to the official brochure, there are signs and plaques at the park to inform visitors about the statuary and its founder.[4]

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[3] The brochure describes statuary scenes numbers 11, "On the Third Day," and 12, "Christ's Blessing[] The First Statue," which the County concedes are on church property.

[4] One plaque at the park states, "Antone Martin, Sculptor[:] Desert Christ Park was conceived and brought into being through his dedication, faith, sincerity and application." Another sign, located at the entrance to the park, reads in part, "In order to perpetuate and protect the biblical artistry in statuary created by Antone Martin, these acres were given to the Yucca Valley Parks & Recreation District by Fred Storey and Ted Turling."

On November 12, 1987, the plaintiffs, all residents of San Bernardino County, filed a complaint against the County alleging its ownership and maintenance of the park violated the state and federal constitutions. Less than one week later, the County wrote to the pastor of the adjoining church explaining its proposed strategical response to the suit. The County outlined four steps it would take to "blunt" this litigation:

> 1) rename and change the signs on the park to the Antone Martin Memorial Park;[5]
>
> 2) construct a four-foot fence along the property line common to the park and the church;
>
> 3) provide more historical information at the park for visitors; and
>
> 4) rewrite the brochure to emphasize historical, instead of biblical, elements.

New signs were put up, a low chain-link fence was run along a portion of the park-church border, and a new brochure was printed. The new brochure eliminated direct citations to the Bible, but retained descriptions of the statuary, e.g., "Sermon on the Mount" and "Garden of Gethsemane." In fine print, the new brochure states:

> Antone Martin was not a particularly religious man and was adamant that the park not be used for any religious purposes. According to those who knew him he picked biblical characters to sculpt as he felt they best portrayed the 'peace

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[5] However, subsequent County action required that the former name of the park, Desert Christ, be retained in parentheses on all signs for ten years.

> on earth' sentiment he was trying to impress on his fellow man.

At the time of trial, the phonebook ad remained unchanged.

The district court held a bench trial and heard testimony from six witnesses: the photographer that produced the plaintiffs' exhibits, two plaintiffs, two experts in religious studies, and the director of the Yucca Valley Parks and Recreation District. Both experts testified that the statues were distinctly religious symbols of the Protestant-Christian faith. Except for the park director, all of the witnesses stated that they perceived a religious message when they visited the park. No evidence was given regarding the circumstances surrounding the park's donation. Instead, the trial focused solely on the current condition of the property and the County's asserted secular purposes in owning the park.

In a published opinion, the district court ruled that the County's ownership and maintenance of the park did not violate the Establishment Clause of the federal constitution. *Hewitt v. Joyner*, 705 F.Supp. 1443, 1447-52 (C.D.Cal. 1989). The court then summarily dismissed the plaintiffs' state constitutional claims on the grounds that the state constitution's provisions did not require a different result. *Id.* at 1452-53. The plaintiffs timely appealed the judgment against them.

II.

The district court found that the five plaintiffs, all residents of San Bernardino County, had standing to challenge the County's ownership and maintenance of the

park. The court based this finding on two grounds. First, two of the plaintiffs demonstrated an injury in fact by the curtailment of their right to use a public park. *Hewitt*, 705 F.Supp. at 1445-46 (citing *ACLU of Georgia v. Rabun County*, 698 F.2d 1098 (11th Cir. 1983)). Secondly, as county taxpayers, the plaintiffs had a right to challenge the constitutionality of the government's use of their tax monies. *Id.* at 1446 (citing *Frothingham v. Mellon*, 262 U.S. 447 (1923)). At trial, the plaintiffs testified that they paid local taxes and the director of the park district admitted that the district's budget was partially supported by the San Bernardino County General Fund.

We affirm the district court's determination that the plaintiffs have standing to challenge the County's ownership of the park. Other circuits have recognized that when a plaintiff alleges that the government has unconstitutionally aligned itself with religion, standing may be based on finding that the plaintiff has been injured due to his or her not being able to freely use public areas. *See, e.g., ACLU of Illinois v. City of St. Charles*, 794 F.2d 265, 267-269 (7th Cir.) (plaintiffs had standing when they were so offended by government-owned cross that they departed from their usual route to avoid it), *cert. denied*, 479 U.S. 961 (1986); *ACLU of Georgia v. Rabun County*, 698 F.2d 1098, 1107-08 (11th Cir. 1983) (standing found where plaintiffs stopped using state park which included an illuminated cross).

III.

The plaintiffs contend that the district court erred in its analysis of both their federal and state constitutional

claims. It is well-established that this court should avoid adjudication of federal constitutional claims when alternative state grounds are available. *Siler v. Louisville & Nashville R.R. Co.*, 213 U.S. 175, 193 (1909). "[F]ederal constitutional issues should be avoided even when the alternative ground is one of state constitutional law." *Carreras v. City of Anaheim*, 768 F.2d 1039, 1042-43 (9th Cir. 1985) (citations omitted). We find that the County's ownership of the park violates the California Constitution, and therefore we do not address the plaintiffs' federal constitutional claims.

A district court's interpretation of state law is reviewed de novo. *Matter of McLinn*, 739 F.2d 1395, 1397 (9th Cir. 1984) (en banc). "When interpreting state law, a federal court is bound by the decision of the highest state court." *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990) (citing *Dimidowich v. Bell & Howell*, 803 F.2d 1473, 1482 (9th Cir. 1986), *reh'g denied, op. modified*, 810 F.2d 1517 (9th Cir. 1987)). Although the California courts have never addressed the precise issues presented in this case, "[f]ederal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul v. Watchtower Bible Tract Soc. of New York*, 819 F.2d 875, 879 (9th Cir.), *cert. denied*, 484 U.S. 926 (1987). When the state supreme court has not spoken on an issue, we must determine what result the court would reach based on state appellate court opinions, statutes and treatises. *Kirkland*, 915 F.2d at 1239; *Molsbergen v. United States*, 757 F.2d 1016, 1020 (9th Cir.) (citations omitted), *cert. denied*, 473 U.S. 934 (1985).

IV.

The district court found that the California Constitution's provisions addressing the separation of church and state were substantially similar to the Establishment Clause of the United States Constitution. *Hewitt*, 705 F.Supp. at 1452-53. The court summarily concluded that the state constitution was not violated. *Id.* We find that the trial court misread the California Constitution and the state court opinions interpreting it, and therefore we reverse.

The California Constitution contains three separate provisions pertaining to the separation of church and state. Based on these provisions, the state courts have developed a body of law regarding the appropriate relationship between religion and the state which is independent from that of the federal courts. The first provision is article I, section 4, the language of which is very similar to the federal Establishment Clause.[6] However, it also provides that the state may not discriminate between

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[6] Section 4 states in full:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion.
>
> A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

Cal. Const. art. I, § 4.

religions or prefer one religion over another. Cal. Const. art. I. § 4. The second provision, article XVI, section 5, strictly prohibits any governmental support for religious purposes.[7] Cal. Const. art. XVI, § 5. Finally, article IX, section 8 prohibits the use of public money for religious schools. Cal. Const. art. IX, § 8. These sections are "proof of the framers' intent to build a Jeffersonian wall of separation between church and state in California." *Sands v. Morongo Unified School Dist.*, 281 Cal. Rptr. 34 (Sup.Ct. 1991) (Mosk, J., concurring).

We find that the County's ownership of the Antone Martin Memorial Park violates both article I, section 4 and article XVI, section 5 of the California Constitution.

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[7] This section states in full:

> Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, or hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; provided, that nothing in this section shall prevent the Legislature granting aid pursuant to Section 3 of Article XVI.

Cal. Const. art. XVI, § 5. Section 3 of Article XVI allows state money to be given to private institutions to aid orphans and other needy persons.

A.

In its discussion of the California Constitution, the district court here stated:

> California courts have utilized the three prong *Lemon [v. Kurtzman*, 403 U.S. 602 (1971)] test in analyzing alleged violations of section 5 of Article 1, the state's parallel version of the U.S. Constitution's establishment clause. As such, the above analysis of the First Amendment's establishment clause applies equally to section 5.

Hewitt, 705 F.Supp. at 1452 (citing *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978); *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154, 34 Cal. Rptr. 387 (1963)).[8] Contrary to the district court's statement, the state courts have not limited their interpretation of the California Constitution to the United States Supreme Court's interpretation of the federal constitution.[9]

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[8] The district court erroneously referred to section 5 as the relevant section. However, section 5 of article I mandates that the state military is subordinate to the civil power of the state. Cal. Const. art. I, § 5.

[9] In fact, neither the *Fox v. City of Los Angeles* nor the *County of Los Angeles v. Hollinger* majority opinions mentioned the Supreme Court's *Lemon* test. *See Fox*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867; *Hollinger*, 221 Cal. App. 2d 154, 34 Cal. Rptr. 387. In *Fox*, the *Lemon* test is mentioned only in a concurring opinion by Chief Justice Bird in which she found that the city's display of a cross also violated the establishment clause of the federal constitution. *Fox*, 22 Cal. 3d at 806-12, 587 P.2d at 672-76; 150 Cal. Rptr. at 876-80. The *Hollinger* opinion could not have relied on the Supreme Court's opinion in *Lemon* because it was issued eight years before the federal opinion.

Article I, section 4 of the California Constitution contains both a prohibition on state establishment of religion and a no preference clause. A plurality of the California Supreme Court recently noted:

> [t]he Attorney General of this state has observed that "it would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of religion" than that found in the "no preference" clause, and California courts have interpreted the clause as being more protective of the principle of separation than the federal guarantee.

Sands v. Morongo Unified School Dist., 281 Cal. Rptr. 34 (Sup. Ct. 1991) (Kennard, J.) (quoting 25 Op. Cal. Atty. Gen. 316, 319 (1955) and citing *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867 (1978)).[10] The no preference clause has been found to prohibit any appearance that the government has allied itself with one specific religion. *Id.* In *Okrand v. City of Los Angeles*, 207 Cal. App. 3d 566, 254 Cal. Rptr. 913 (1989), a state appellate court noted the similarity in language but difference

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[10] In *Morongo*, five of the seven state supreme court justices held that religious invocations and benedictions at public high school graduation ceremonies violated the U.S. Constitution. Justice Kennard wrote the opinion for the court and also held that the graduation prayers violated the California Constitution. Two justices concurred in that part of her opinion addressing the state constitution. Of the other four justices, two thought that the court should not reach the state constitutional issue, while two found that the prayers did not violate either the state or federal constitution.

in application of the state provision and the federal constitution. " 'California's constitutional provisions are more comprehensive than those of the federal [c]onstitution.' " *Id.* at 571, 254 Cal. Rptr. at 916 (quoting *Bennett v. Livermore Unified School Dist.*, 193 Cal. App. 3d 1012, 1016, 238 Cal. Rptr. 819 (1987) (citations omitted)).

The *Okrand* court did recognize that an analysis under the state constitution frequently produces the same results as an analysis under the federal constitution. Therefore, it held that because there are few state cases addressing free exercise and establishment of religion, a state court "may 'also consult principles of federal cases as they seem compelling guides to uncharted state grounds.' " *Id.* at 572, 254 Cal. Rptr. at 916 (quoting *Feminist Women's Health Center, Inc. v. Philibosian*, 157 Cal. App. 3d 1076, 1086, 203 Cal. Rptr. 918 (1984), *cert. denied*, 470 U.S. 1052 (1985)). The court then incorporated the *Lemon* test into its constitutional analysis but specifically noted that California courts should not view the *Lemon* test as absolute " 'but as a touchstone with which to identify instances where the objectives of the establishment clause have been compromised.' " *Id.* at 573 n.6, 254 Cal. Rptr. at 917 n.6 (quoting *Johnson v. Huntington Beach Union High School Dist.*, 68 Cal. App. 3d 1, 11, 137 Cal. Rptr. 43, *cert. denied*, 434 U.S. 877 (1977)). Having established that the California Constitution's provision prohibiting governmental establishment or preference of religion is not limited by the United States Constitution, we examine how the state courts have applied this provision.

B.

The California courts have interpreted the no preference clause in article I, section 4 to require that not only may a governmental body not prefer one religion over another, it also may not *appear* to be acting preferentially. Two recent opinions by the California courts define the state constitutional limits on government-sponsored religious displays. In *Fox*, the California Supreme Court held that the City of Los Angeles may not light a cross on city hall during Christmas and Easter; while in *Okrand*, the appellate court permitted the city to display an unlit menorah in the city hall rotunda.

In *Fox*, the court first noted that the United States Supreme Court's opinions addressing permissible religious displays under the federal constitution were not clear. *Fox*, 22 Cal.3d at 795, 587 P.2d at 664, 150 Cal. Rptr. at 868. Turning to the state constitution, the court applied the no preference clause of section 4 and ruled:

> [i]n the California Constitution there is no requirement that each religion always be represented. To illuminate only the Latin cross, however, does seem preferential when comparable recognition of religious symbols is impracticable.

Id. at 797, 587 P.2d at 665, 150 Cal. Rptr. at 869. The court distinguished its earlier decision *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801 (1924), in which a school library's decision to purchase a copy of the King James Bible was found to be constitutional. The *Fox* court noted "[l]ibrarians quite easily can offset a potential for preference, but a city hall tower is much less tractable

than are shelves of a school library." *Fox*, 22 Cal. 3d at 797, 587 P.2d at 666, 150 Cal. Rptr. at 870.

In *Fox*, the City of Los Angeles contended that because the cross-lighting had occurred for 30 years without citizen complaint, obviously the public did not perceive any preference on the part of the city. *Id.* The court rejected this argument, acknowledging that the silence of religious minorities may signal something quite different from disinterest. *Id.* Finally, the city offered government reports which implied that the cross had been put up, not for religious reasons, but rather as a " 'symbol of the spirit of peace and good fellowship toward all mankind on an interfaith basis, particularly toward the eastern nations in Europe.' " *Id.* at 798, 587 P.2d at 666, 150 Cal. Rptr. at 870 (citation omitted). Again, the court found such an assertion meritless. It refused to suspend belief and accept the city's secular explanation given the clear religious meaning of the cross. "Easter crosses differ from Easter bunnies, just as Christmas crosses differ from Christmas trees and Santa Claus." *Id.*

Conversely, in *Okrand*, the court permitted the display of an unlit menorah in the rotunda of the Los Angeles City Hall. The display was part of an exhibit which included a Christmas tree and made "no 'effort to express some kind of subtle governmental advocacy of a particular religious message.' " *Okrand*, 207 Cal. App. 3d at 574, 254 Cal. Rptr. at 918 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 680 (1984)). After finding that the display satisfied the three prongs of the *Lemon* test, the *Okrand* court looked to the California Constitution to determine whether the display violated the "preference" test as articulated in *Fox*. *Id.* at 579, 254 Cal. Rptr. at 921. "That

is, we are to inquire whether the governmental action exhibits a preference for a religion or a religious belief." *Id.* The *Okrand* court found the display did not exhibit a preference for one religion because there was recognition of other religious symbols; the display of the menorah did not dominate the exhibit; the particular menorah displayed (the Katowitz Menorah saved from the Holocaust) was more a museum piece than a symbol of religious worship; and the "menorah differs in degree from the Latin cross in terms of its significance as a symbol of religion." *Id.* at 579-80, 254 Cal. Rptr. at 921-922. Therefore, the court concluded that the city's display of the unlit menorah was permissible under both the California and United States Constitutions.

We must apply the legal principles articulated by these decisions to the case at bar. The district court here repeatedly quoted language from Supreme Court cases that museums which display religious art do not violate the Establishment Clause. *Hewitt*, 705 F.Supp. at 1450-52. It concluded that the "[p]ark, as such, is more like a museum in content and display, than a public park." *Id.* at 1450. However, the essential difference between the County's park and a public museum is pivotal to our conclusion that the County's ownership violates the California constitution.

"A typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content." *Lynch* at 692. However, every religious display that is put in an "artistic" form, such as painting or sculpture, instead of the "mannequin-like" form of the creche or cross is not saved from First Amendment scrutiny. While the majority of

cases have concerned holiday displays of crosses or creches, e.g., *Fox*, 22 Cal. 3d 792, 587 P.2d 663, 150 Cal. Rptr. 867; *Okrand*, 207 Cal. App.3d 566, 254 Cal. Rptr. 913, few courts have tackled the more difficult problem of religious artwork.

A "typical" museum, like the city hall in *Okrand*, may display a variety of artwork. The Antone Martin Memorial Park is restricted to only the artwork already in existence. Unlike the library considered by the state supreme court in *Evans*, the County here may not "easily . . . offset a potential for preference." *Fox*, 22 Cal. 3d at 797, 587 P. 2d at 666, 150 Cal. Rptr. at 870. In addition, the religious nature of the statues is emphasized by their surroundings – the neighboring church and hill-side cross. The effect and message of the park is a religious one.

The *Fox* court's decision relied on a fact-specific analysis of the physical limits of the display in question. Additionally, the *Okrand* court expressed approval of the revolving nature of the city hall display and its diversity. *Okrand*, 207 Cal. App. 3d at 574, 254 Cal. Rptr. at 918. The case before us presents constraints, similar to those in *Fox*, on the display of secular or non-Christian religious pieces. The park's deed requires that the statuary not be altered. Because of their dominance of the landscape, the statues are more symbols of worship than museum pieces. Unlike a museum or a library which is free to add or subtract from its collection, the Antone Martin Memorial Park is a static collection of Christian symbols displayed and maintained by the government.

Here, the County asserts that it accepted and has maintained the park for tourism reasons and to memorialize a locally well-known artist. The plaintiffs have presented no evidence to contradict the defendant's asserted secular purposes. However, the no preference clause is not satisfied by a secular purpose. Regardless of the County's intentions, it has violated the California Constitution by appearing to endorse the religious message of Antone Martin's sculptures.

Finally, the district court noted with approval the efforts taken by the County to minimize any religious message or indication of preference on the part of the County. *Hewitt*, 705 F.Supp. at 1450.

> County officials saw to it that none of the statues contained any labels identifying the depiction or linking any likeness to the Christian religion. No signs were in evidence anywhere that would suggest county endorsement of a religion. No religious meetings of any kind were permitted on the area and the name of the park was changed to one which attempted to make clear that the property was a memorial to the sculptor and his theme of peace, and not a place dedicated to one religion.

Id. at 1448.[11] We do not find these facts persuasive.

The allegedly great efforts taken by the County to ensure that a religious message was not perceived by the

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[11] The district court errs when it states, "A sign was erected disclaiming any intention to maintain the park for religious purposes." *Hewitt*, 705 F.Supp. at 1445. In fact, the erection of a sign was part of the district court's order. *Id.* at 1453.

public are unsuccessful. The park's name change, the new fence and the revised brochure do not change the clear religious message of the park. The statues are exclusively of biblical figures and scenes from the First Testament. Moreover, during the vast majority of the County's ownership, the park was allowed to appear as an extension of the nearby church (or, alternatively, the hillside cross was viewed as part of the public park), the brochures contained citations to passages in the Bible, and the park was named and advertised as "Desert Christ Park." "The 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny v. A.C.L.U.*, 109 S.Ct. 3086, 3121 (O'Connor, J., concurring). When viewed in its historical context, the County's ownership of the park depicts a government-endorsement of the Christian faith.

We conclude that the County's ownership of the Antone Martin Memorial Park violates article I, section 4 of the California Constitution based on the clear religious message of the statuary, the static nature of the display, and the history of the County's ownership.

C.

In addition to the no preference clause in Article I, section 4, the California Constitution includes a broad ban on the use of public property or funds to support religious purposes. Cal. Const. art. XVI, § 5. The state courts have interpreted this section broadly. Specifically, the courts have found that a municipal body's legitimate

secular interest in attracting tourist dollars can not outweigh the constitution's strict ban on governmental aid to religion. *See County of Los Angeles v. Hollinger,* 221 Cal. App. 2d 154, 34 Cal. Rptr. 387 (1963); *Frohliger v. Richardson,* 63 Cal. App. 209, 218 P. 497 (1923). We find that the state constitution forbids taxpayer support of Antone Martin's religious statuary.

In *County of Los Angeles v. Hollinger,* a state appellate court refused to enforce a contract between Los Angeles County and the Bethlehem Star Parade Association to film the Association's annual Christmas parade. The parade was composed of floats representing scenes from the Old and New Testament of the Bible. The Association's stated purpose was "to 'restore the original significance of Christmas.' " *Hollinger,* 221 Cal. App.2d at 159, 34 Cal.Rptr. at 390 (citation omitted). Because the parade was a tourist attraction, the County Board of Supervisors wanted to distribute a color film of the parade to further increase the number of tourists to the area. Acting pursuant to California law authorizing publication of city attractions, the County agreed to pay the Association to film its parade and to circulate the film for advertising purposes. *Id.* at 156-57, 34 Cal.Rptr. at 389. The purpose expressed in the contract was to publicize the attractions of the County. Based on this information, the appellate court concluded:

> [A]lthough publicizing the attractions of the county is a proper secular purpose authorized by section 26100 of the Government Code, nonetheless this authority necessarily is limited by

> section 30 of Article IV of the California Constitution which provides in part: "Neither the Legislature, nor any county, . . . shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, . . . "

Id. at 158, 34 Cal. Rptr. at 390.

The County argued that the Association's reasons for presenting the parade should be irrelevant to the court's analysis when there was no evidence that the government's filming of the parade was religiously motivated. The court did not find this logic persuasive. It distinguished this case, where the religious parade was the sole subject of the film, from one in which a variety of local attractions were highlighted. *Id.* at 162, 34 Cal. Rptr. at 392.

> It is common knowledge that there are a great many other religious spectacles, festivals and parades, conducted and promoted by other groups, that also attract visitors to the county. Each of these groups doubtless would be willing, if they did not in fact insist upon their equal right, to assist in advertising the county by filming and distributing nationally at county expense their own functions. The strife likely to be engendered among such competing groups, no one of which could be decreed to be more meritorious than any of the others, is the precise danger which, . . . these constitutional guaranties were designed to eliminate.

Id. In rejecting the County's argument, the court relied on *Frohliger v. Richardson*, 63 Cal. App. 209, 217, 218 P. 497

(1923), where public financing to restore the San Diego Mission was found unconstitutional.

The *Frohliger* opinion is a strong statement by the California courts that the existence of a legitimate secular purpose will not redeem otherwise prohibited governmental aid to religion. Holding that public money could not be used to restore the San Diego Mission, the court did not attempt to refute the motivations proffered by the government.

> We concede that the California missions are of historical and educational interest from a cultural and literary standpoint, but they approach no such classification as would make them the basis of the state's bounty or the subject of legislative appropriation in the guise of public interest, public good, or public welfare.
>
> . . . .
>
> We have endeavored to make it clear that we are in sympathy with the meritorious movement having for its object the restoration and preservation of the missions, but no matter how praiseworthy we may believe such efforts to be, we must say that, in our opinion, the state constitution forbids that such work be done at the expense of the taxpayers. We believe that the act of the legislature under consideration is in manifest violation of . . . the state constitution. . . .

Id. at 217, 218 P. at 500. The *Frohliger* court saw the state's aid to the mission as an invitation to other religious groups "seeking money for restoration of old buildings, upon the ground that they were of historical and educational interest and therefore of public concern." *Id.*

Additionally, it is not a defense to the California Constitution's prohibition on governmental aid of religion, that the amount of money expended on the Antone Martin Memorial Park is relatively small. As Justice Bird wrote in her concurrence in *Fox:*

> Those who argue that the amount of taxpayer funds expended to light the cross is so minimal as to be beneath this court's notice, overlook two important considerations. First, article XVI, section 5 admits of no de minimis exception. The language is explicit: No "city . . . shall ever . . . pay from any public fund whatever, or grant anything to or in aid of any religious sect. . . . " Secondly, the prohibitions of article XVI, section 5 would come into play even if no funds were expended. The ban is on aid to religion in *any* form.

Fox., 22 Cal. 3d at 806, 587 P.2d at 671-72, 150 Cal. Rptr. at 875-76 (Bird, J., concurring) (emphasis in original).

It is uncontested that the Antone Martin Memorial Park attracts visitors to Yucca Valley and San Bernardino County. The County seeks to encourage this tourism by advertising the park in the phonebook, by printing brochures and by maintaining the park grounds. We do not dispute the County's assertion that the park is valued for its ability to attract tourists. However, the California Constitution forbids the County's use of a religious statuary park to achieve a secular goal, particularly, where, as here, the government's publicity of the park focuses on the religious aspects of the statues.[12] As noted in

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[12] Contrary to the County's apparent belief, many people do not consider the events described in the bible regarding the death of Jesus Christ "historical."

Hollinger, there may be many other religious groups in San Bernardino County which would appreciate government sponsorship of their religious parks or cemeteries. The California people have written their constitution to guard against exactly this type of situation.

More recently, in *California Teachers Assn. v. Riles,* 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981), the California Supreme Court applied article XVI, section 5, and ruled that it was unconstitutional for state schools to lend textbooks to parochial schools. This ruling was contrary to decisions by the United States Supreme Court in similar cases. The state supreme court developed a two-part test for determining if governmental aid violated the state constitution. *Id.* at 809, 632 P.2d at 962, 176 Cal.Rptr. at 309, "[W]e consider first whether the aid is direct or indirect, and second whether the nature of the aid is substantial or incidental." *Sands v. Morongo Unified School Dist.*, 281 Cal. Rptr. 34 (Sup.Ct. 1991) (Mosk, J., concurring) (citing Note, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions,* 37 Hasting L.J. 499, 532 (1986)).

We find that the County's ownership of the Antone Martin Memorial Park also violates the state constitution under the test set forth in *Riles.* The County's support of the park is clearly direct. It holds the deed to the park and pays for its maintenance. The second prong of the test asks whether the support given by the County more than incidentally benefits the religious view symbolized by the park's statuary. The plaintiffs' testimony at trial undermines any argument that the government support to religion here is only incidental. Each plaintiff was

surprised and disturbed by the apparent endorsement the County was giving to the religious message of Antone Martin's statues. Antone Martin created a religious park, the only change that has been made since his death is that now the taxpayers of San Bernardino County pay for the park's services.

We hold that the County has violated article XVI, section 5, by its ownership and maintenance of the Antone Martin Memorial Park.

V.

The plaintiffs request attorney fees under 42 U.S.C. § 1983, which grants appellate courts discretionary power to order attorney fees. "A prevailing [civil rights] plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quotations omitted). The fact that we base our decision on state, rather than federal, grounds does not constitute such a special circumstance. *See Carreras v. City of Anaheim*, 768 F.2d 1039, 1050 (9th Cir. 1985) (fee award appropriate where plaintiff prevails on state law claim based on "a common nucleus of operative fact with a substantial federal claim"). We therefore instruct the trial court on remand to consider appellants' fee request.

VI

In its brief, the County argues, "[t]here is no constitutional formulation that religious art inside a museum is lawful preservation but outside a museum is unlawful

establishment of religion." Their argument highlights the difficulty of this case. Neither the California nor the United States Constitution prohibit governments from preserving their cultural and artistic heritage. However, the argument that a religious display is art or a tourist attraction will not protect the display from the restrictions on government-sponsored religion which the people of California have put in their constitution.

Given the factual and historical context of the County's ownership of Antone Martin Memorial Park, we find that the County has violated both article I, section 4 and article XVI, section 5 of the California Constitution. Therefore, we REVERSE the district court's judgment and REMAND to the district court directing that it grant the appellants' petition for declaratory and injunctive relief.

APPENDIX


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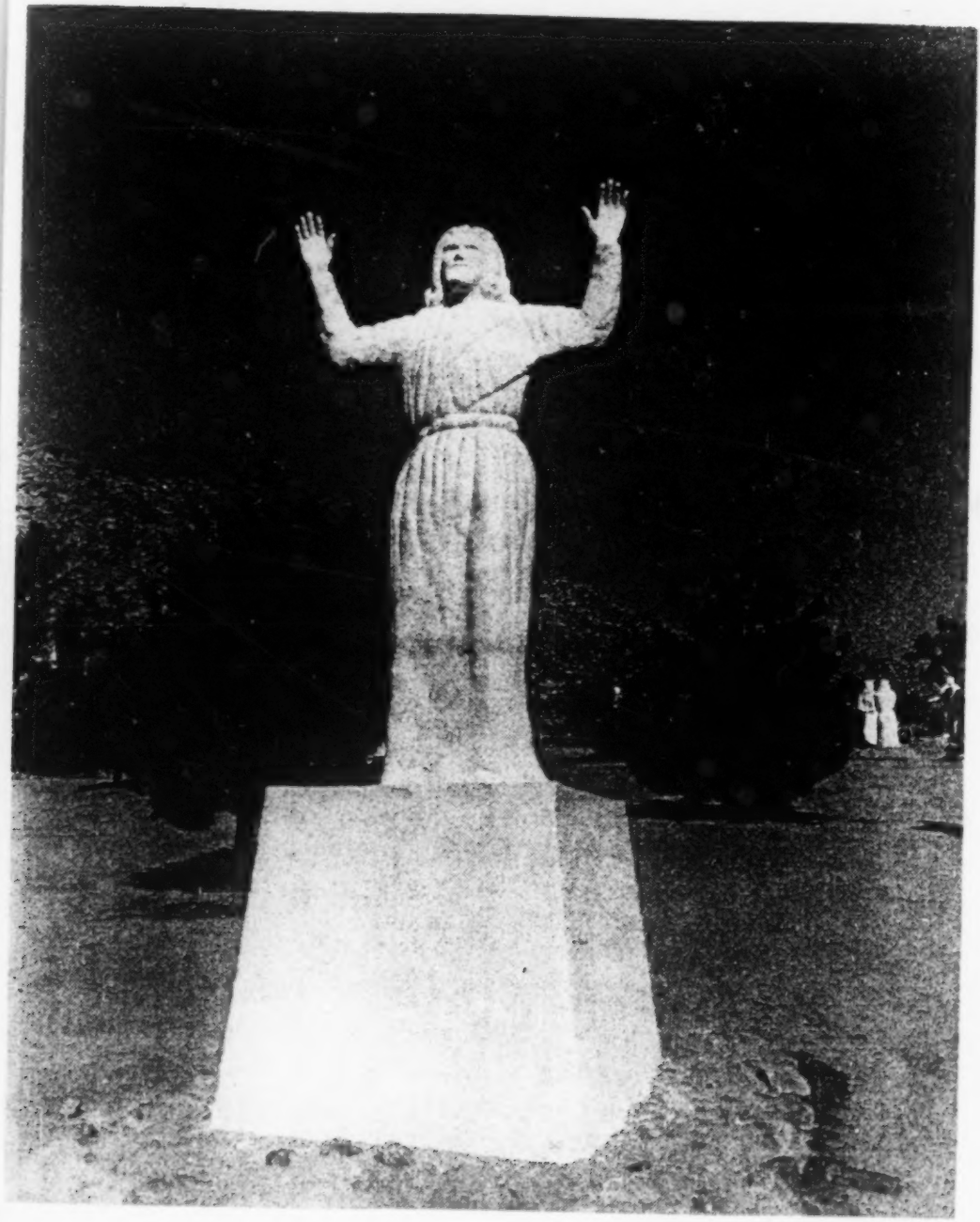

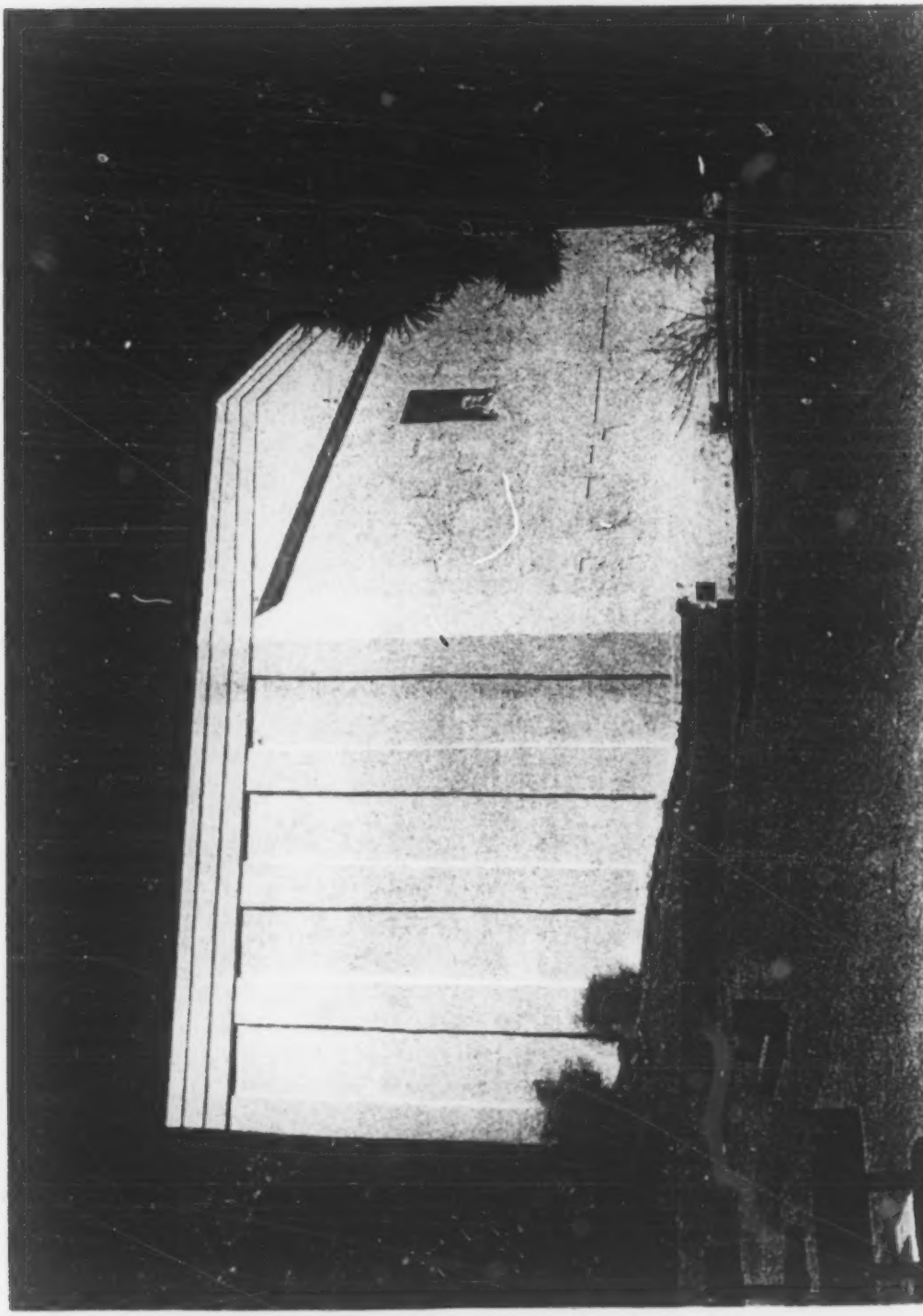

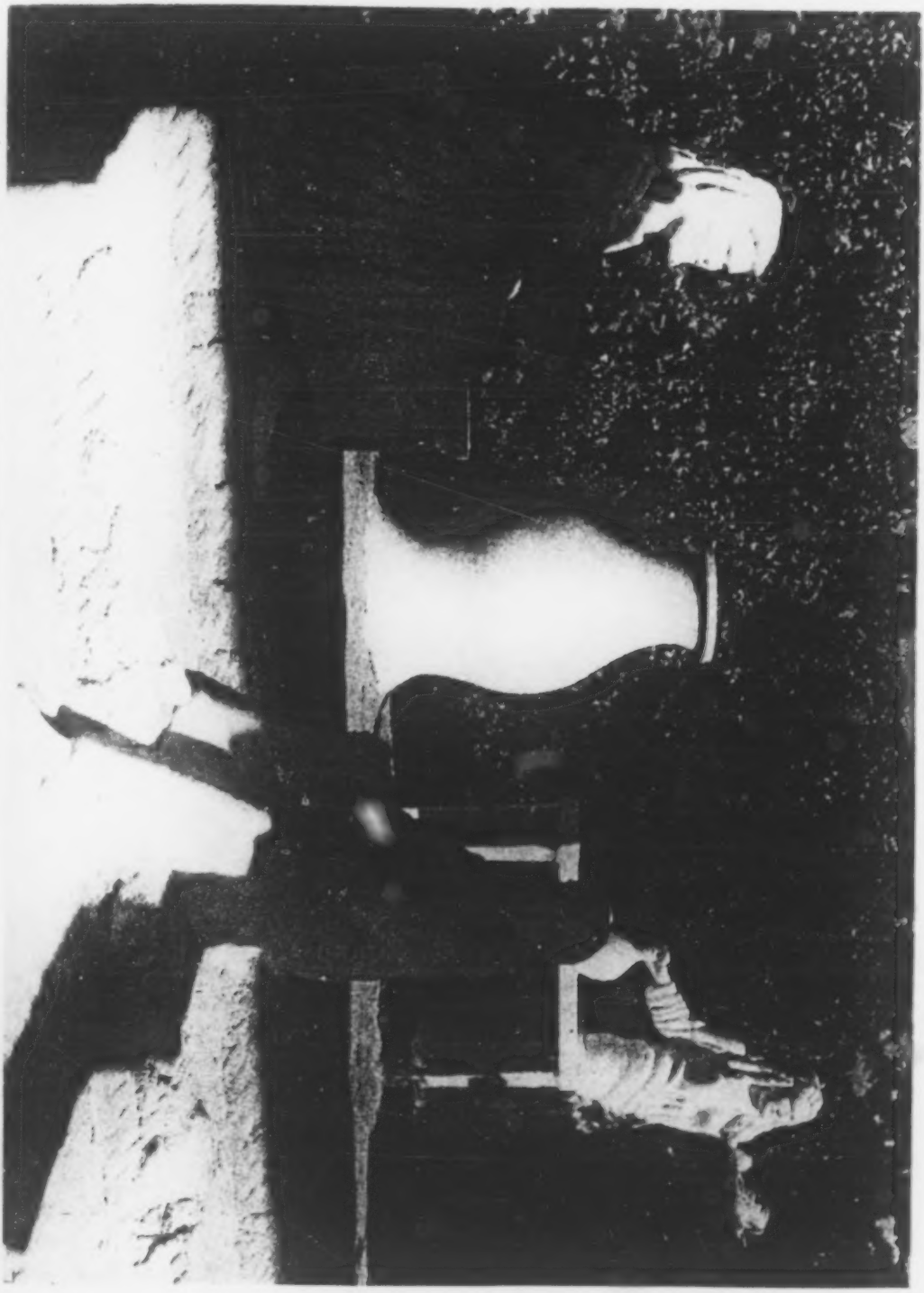

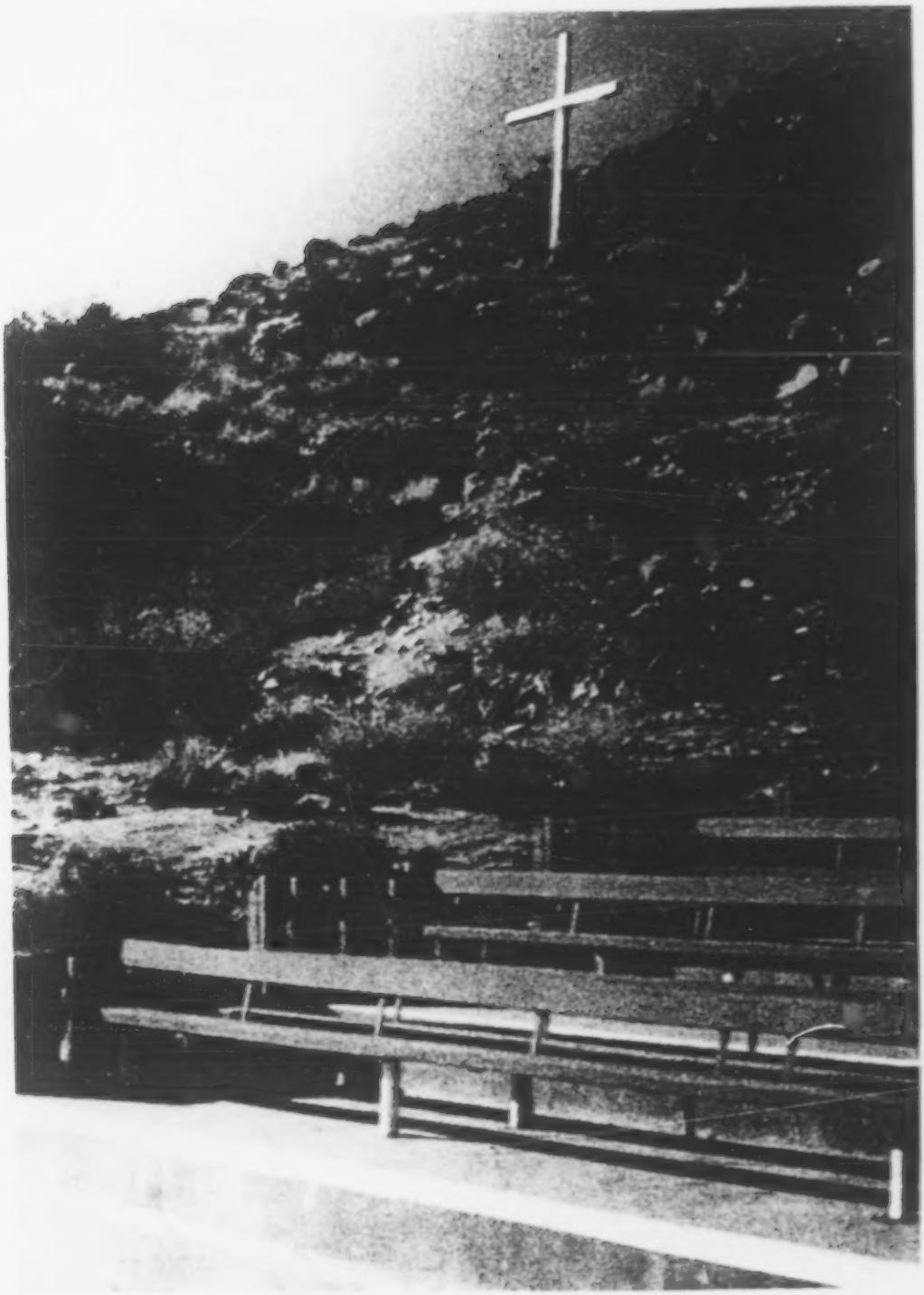

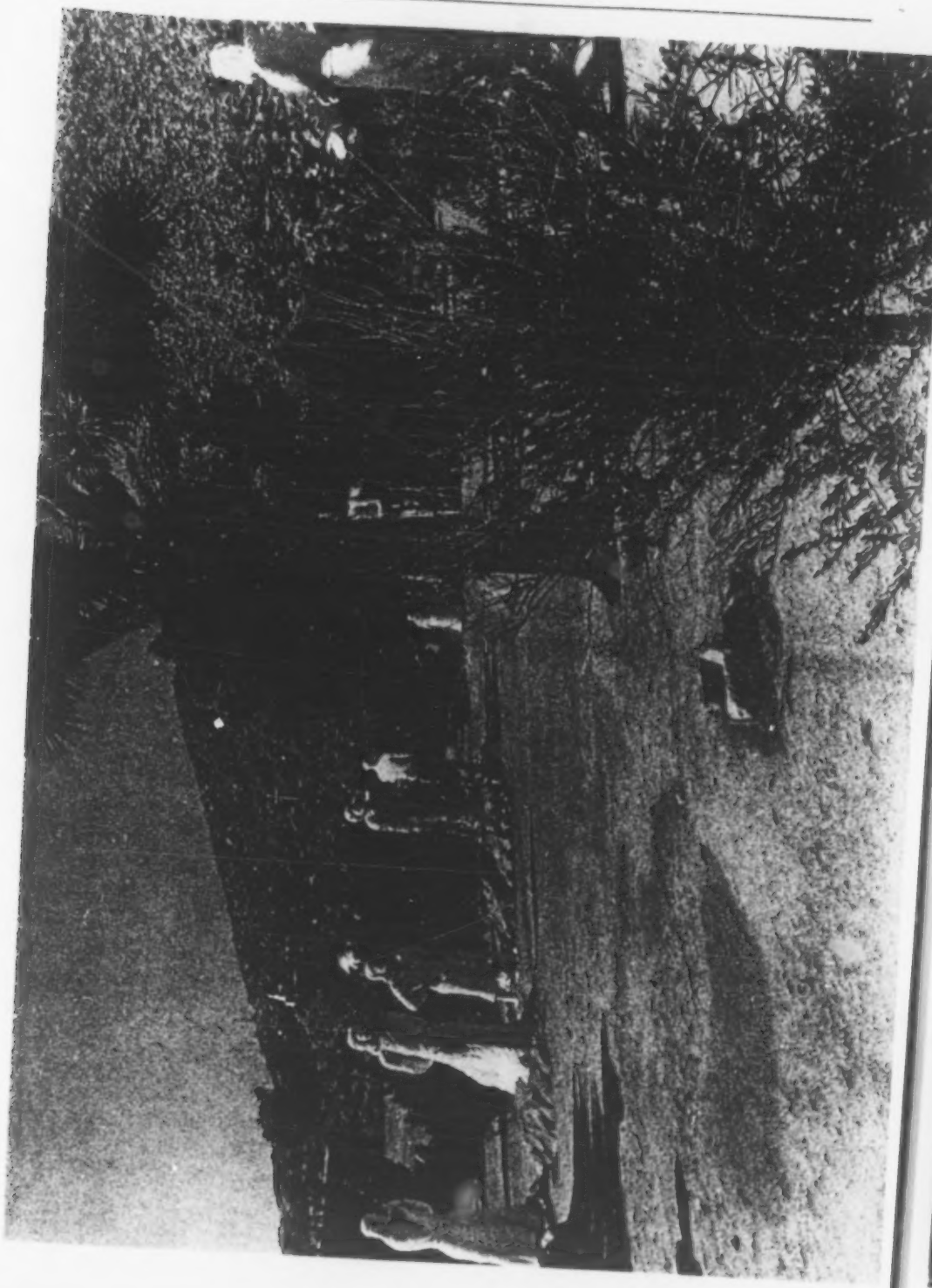

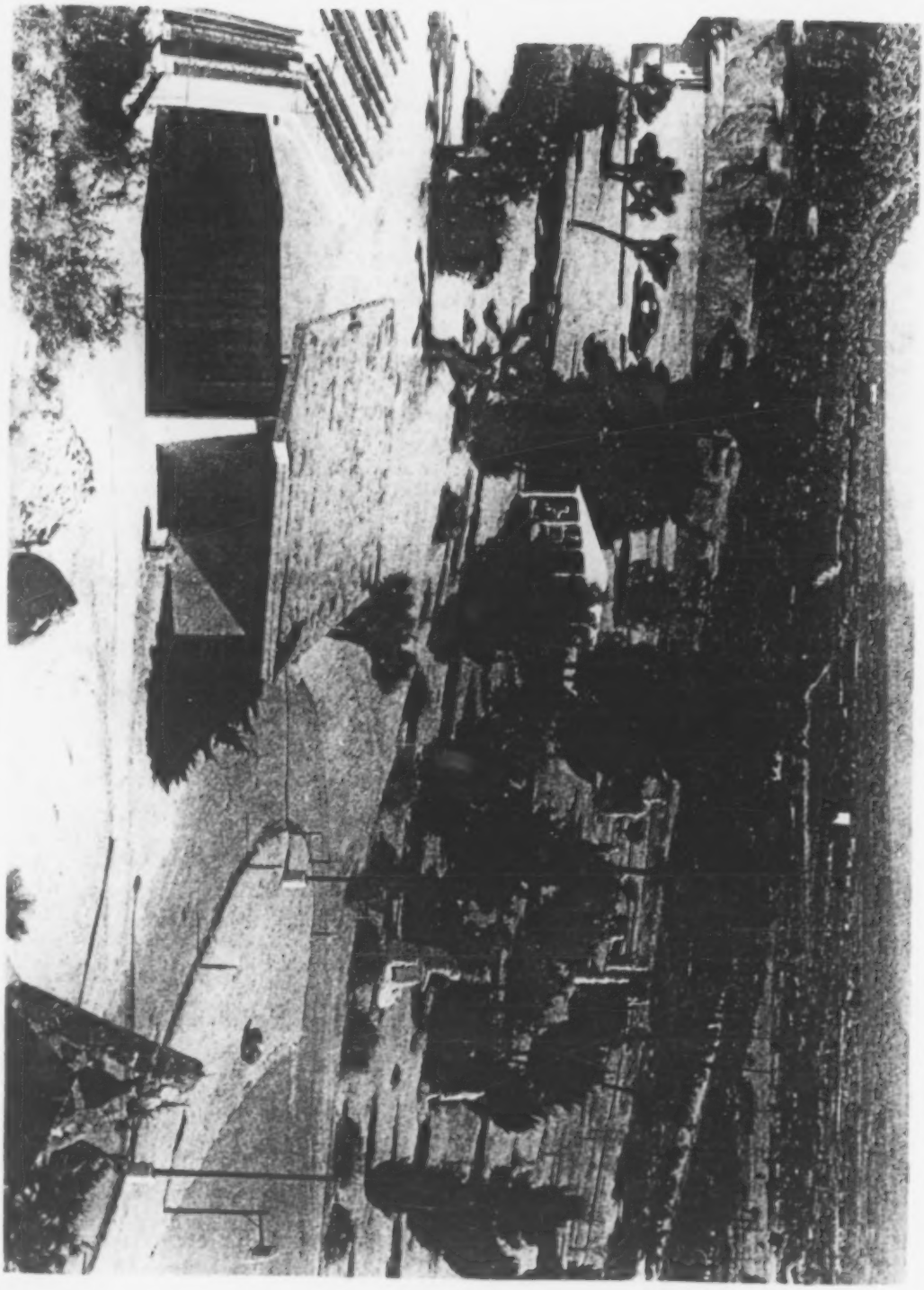

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

RUBY HEWITT; RALPH WINANT; JERRY WEITZMAN; DARRELL BARKER and DENNIS MOLLOY, Plaintiffs, v. JOHN JOYNER; ROBERT HAMMOCK; JON D. MIKELS; BARBARA RIORDAN; and LARRY WALKER, in their official capacities as members of the San Bernardino County Board of Supervisors; YUCCA VALLEY PARKS AND RECREATION DISTRICT, Defendants,	CASE NO. CV 87-7605 DWW (JRx) MEMORANDUM OPINION (FILED FEB 6 1989)

This civil rights action, brought under 42 U.S.C. section 1983, came on for trial before the court sitting without a jury on January 24, 1989. Carol A. Sobel and John Hagar of the ACLU Foundation of Southern California, seeking declaratory and injunctive relief, appeared for plaintiffs. David L. Llewellyn Jr. appeared for defendants. The court heard witnesses for both sides, received documentary evidence and heard arguments of counsel. Thereafter, the matter was taken under submission.

FACTS OF THE CASE

This suit challenges the constitutionality of the County of San Bernardino's owning and maintaining with public funds, a 3.5 acre public park located in Yucca Valley California, because the park features a collection of biblical statuary. The park was originally owned by Antone Martin, a sculptor, who lived on the park site from 1953 until his death in 1961. He devoted all those years to the creation of white concrete statuary depicting various biblical scenes. The collection consists of 36 statues and tableaus which are scattered among the indigenous Joshua trees and cottonwoods and was intended as describing the life of Christ. The sculptor attempted to create scenes as they may have been enacted two thousand years ago. Antone Martin dedicated the collection of statues as a World Peace Shrine portraying the artist's concept of peace on earth and good will toward men.

The statues, which were created on the site, are made of solid concrete and were given triangular bracing extending down into a block of cement underground, thus firmly anchoring the entire work. The statues weigh from 4 to 16 tons each, except for the Last Supper facade, which is estimated to weigh 125 tons. The park is nestled on a slope of a desert hillside, and the statues are arranged in several groupings which permit visitors to walk in the area and enjoy the scenes as if in an outdoor museum.

When Antone Martin died, his heirs donated the property to the County by a deed which contained the condition that it be maintained with the biblical statuary. The deed contained a reversionary clause. Since 1961, the

County has maintained the property as a public park, which is open 24 hours a day. The public may visit without an admission charge. Picnic tables are available for use without reservation.

From time to time, there were persons who complained about the use of public money to maintain the park. In an effort to mollify such persons, the Board of Supervisors caused a fence to be erected between the park and a church that was located on the adjoining property (but which had no connection with the park site), and changed the name of the park from Desert Christ Park to the Antone Martin Memorial Park. A sign was erected disclaiming any intention to maintain the park for religious purposes. No meetings of any kind, religious or otherwise, are held in the park and it is open for the enjoyment of all persons who may want to use the area.

The plaintiffs in the present action all claim to be residents and citizens of the County of San Bernardino. They allege that they have lost a beneficial right to use and enjoy the park because of their objections to its public ownership. Hewitt professed to being a Christian. Winant and Barker state that they are atheists; Weitzman said he is of the Jewish faith and Molloy claimed to be an agnostic. All claim to be offended whenever they desire to visit and utilize the park's facilities because they assert that the park is dedicated solely to religious themes. (Molloy and Barker submitted declarations and testified at trial for the plaintiffs.)

Jurisdiction is conferred on the court by 28 U.S.C. section 1331, which provides for original jurisdiction over

federal questions, by 28 U.S.C. sections 2201 and 2202 of the Declaratory Judgment Act, and 28 U.S.C. section 1343, which provides for federal jurisdiction in actions authorized by 42 U.S.C. section 1983.

ISSUE

The issue before the court is whether the ownership and maintenance by the County of San Bernardino of a public park containing a collection of permanent statuary depicting replicas of New Testament figures violates the establishment clause of the First Amendment to the United States Constitution and the parallel provisions of the California Constitution?

In analyzing this issue, the threshold question for the court is whether plaintiffs have stated a concrete and palpable injury for purposes of standing. Second, after placing into context the historical complexities surrounding analysis of the establishment clause, the tripartite test utilized in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), shall be applied. Lastly, the court shall examine pendant state claims alleging violations of the California Constitution.

STANDING

Article III of the Constitution limits the judicial power of the United States to the resolution of cases or controversies. *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 465, 472, 102 S.Ct. 752, 70 L.Ed.2d 700 (1982). In order to satisfy the "case or controversy" requirement, a litigant must have

standing to challenge the action sought to be adjudicated in the lawsuit. *Id.; Freedom From Religion Foundation, Inc., v. Zielke,* 845 F.2d 1463, 1467 (7th Cir. 1988). The concept of standing subsumes a blend of constitutional requirements and prudential considerations. *Valley Forge,* 454 U.S. at 471.

At a minimum, Article III of the United States Constitution requires that the litigant satisfy three requirements: (1) he must have suffered personally an actual or threatened injury in fact; (2) the injury must be a result of the defendant's action; and (3) the injury must be redressable by a judicial decision. *Id.* at 472.

The court will first address the primary issue of whether or not plaintiffs have Article III standing by focusing on whether plaintiffs have suffered an injury in fact.

As long as a plaintiff alleges the existence of a distinct palpable injury, even a minor injury can satisfy the case or controversy requirement of Article III. *Valley Forge,* 454 U.S. at 473; *Freedom From Religion Foundation,* 845 F.2d at 1467. A concrete injury in establishment clause cases has been found where a curtailment of rights to use public areas has been alleged. *See ACLU of Illinois v. City of St. Charles,* 794 F.2d 265, 267-269 (7th Cir.1986), cert. denied, ___ U.S. ___, 107 S.Ct. 458, 93 L.Ed. 2d 403 (1986). In the instant case, plaintiffs Darrell Barker and Dennis Molloy both claim to have had their rights to use a public area curtailed.

Barker, an atheist, finds the park's religious content so disturbing that he refuses to use the public park and avoids driving past it when his work requires that he be

in the area. Molloy, an agnostic, frequently uses county parks for his family's recreation, but will not use this park because of the statuary.

Both Barker and Molloy state more than psychological injury in that they had to physically change their normal routine and essentially were denied access to a public area because of their strong disapproval of the religious statuary. Both plaintiffs have therefore, alleged palpable injuries capable of being redressed by the court for purposes of standing. *See St. Charles,* 794 F.2d 265 (standing found where plaintiffs were so offended by a lighted cross so as to depart from their accustomed route of travel to avoid it); *ACLU of Georgia v. Rabun County, etc.,* 698 F.2d 1098 (11th Cir. 1983) (standing found where lighted cross viewable from state parks caused plaintiff campers to refuse to use the parks).

Also, as county taxpayers, plaintiffs have standing to bring this equitable action. *See Frothingham v. Mellon,* 262 U.S. 447, 43 S.Ct. 597, 67 L.Ed. 1078 (1923) ("Resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation.") Defendants contend that plaintiffs have not properly traced their tax dollars to the County's Park and Recreation District. Since general funds were used as a portion of the district budget, however, a clear inference exists that at least a proportionate share of plaintiffs' taxes pay for the park's upkeep.

ESTABLISHMENT CLAUSE

The First Amendment to the United States Constitution declares that "Congress shall make no law respecting an establishment of religion. . . . " The establishment

clause has been interpreted by Justice Black in *Everson v. Board of Education*, thusly:

> "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . In the words of Jefferson, the clause against establishment of religion was intended to erect a wall of separation between church and state." 330 U.S. 15, 16 (1947)[1]

The origin of our country is intertwined with that of religion. This historical truth, along with present day religious diversity and pluralism, has placed strains on the concept of a mythical wall separating church and state.

In 1971, Chief Justice Burger, writing for the majority, acknowledged this strain, stating that the Court's "prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense." *Lemon v. Kurtzman*, 403 U.S. at 614. He reiterated this theme in *Lynch v. Donnelly*, 465 U.S. 668, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984): "In every Establishment Clause case, we must reconcile the inescapable tension between the objective of preventing unnecessary intrusion of either the church or the state upon the other, and the reality that, as the Court has often noted, total separation of the two is not possible." *Id.* at 672.

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[1] Thomas Jefferson first discusses the concept of a "wall of separation" between church and state in a letter to Danbury Baptist Association dated January 1, 1861 [sic], 8 The Writings of Thomas Jefferson 113, (Washington ed. 1861).

Throughout the development of American society, there are innumerable instances of a break with the Jeffersonian notion of the wall. The members of the First Congress employed a congressional chaplain to offer daily prayers in Congress. The practice continues to this day and it is accepted as an example of accommodation that did not offend the Founders. *See Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983) (state legislature's practice of opening each day with a prayer was not violative of the establishment clause as this practice had become part of the historical fabric of our society). Thanksgiving was established as a national holiday by Congress to thank God for our bounty. Christmas has been designated by Congress as a national holiday to observe the birth of Christ and federal employees are compensated while being released from their duties.

The establishment clause, in conclusion, was never meant to create a "callous indifference" towards religion, but rather an accommodation of all religions in our pluralistic society. *Zorach v. Clauson*, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954; *Lynch* at 673. This tension between accommodation and separation contributes to the Court's uneasiness in relying solely on the three-prong test first utilized by the Court in *Lemon v. Kurtzman* for determining violations of the establishment clause. In *Lynch*, the Court emphasized its "unwillingness to be confined" to "any single test or criterion." 402 U.S. at 602. The tripartite *Lemon* test provides "guidelines" for examining possible impermissible government activity. *Tilton v. Richardson*, 403 U.S. 672, 91 S.Ct. 2091, 29 L.Ed. 790 (1961).[2]

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[2] Although described as no more than a "helpful signpost" (*Hunt v. McNair*, 413 U.S. 734, 741 (1973), the *Lemon* test has

(Continued on following page)

With the understanding that a rigid application of any mode of analysis conflicts with the complex historical interpretation of the establishment clause, I turn to the three-prong test as set out in *Lemon* as a general guideline for the court's analysis. First, the statute (or activity) must have a secular purpose; second, its primary effect must be one that neither advances nor inhibits religion; finally, the statute (or activity) must not foster an excessive government entanglement with religion. 403 U.S. 602.

Secular Purpose

In *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 844 (1963), the Court said that to withstand the strictures of the establishment clause, state action asserted to violate that clause must have a secular purpose and a primary effect that neither advanced nor inhibited religion. The rationale of the rule is to prevent the use of public property in such a manner as to connote governmental sponsorship of religious beliefs with the attending result that persons who do not share those beliefs might feel that their own convictions were

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been followed, if not rigidly, by the Supreme Court with the exception of *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, a historical approach predominated in finding prayer before a legislative session not violative of the establishment clause. *Id.*

stigmatized or officially deemed less worthy than those awarded the appearance of official endorsement.[3]

More specifically, the purpose requirement "aims at preventing relevant governmental decision makers . . . from abandoning neutrality and acting with intent or promoting a particular point of view in religious matters." *Corp. of Presiding Bishop v. Amos*, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 273 (1987). In order to find a violation of the purpose prong, the court must be convinced that the motivation for the government's activity lacks secular purpose and is "motivated by wholly religious considerations." *Lynch* at 680.

In *Lynch*, the Court found the district court to be in error for solely focusing on the religious symbolism of a creche. When viewed in context, the creche was said to have a primarily secular purpose given the surrounding displays and the fact that this nation officially celebrates Christmas. Likewise, in the instant case, the artistic, cultural and historical significance, and the manner of displaying the sculptures must demonstrate a secular purpose on the part of government.

Here, the park involved was not created by the County, nor were any public funds used in its creation. It cannot be said that public officials conceived the idea of, or collaborated to establish the statuary park for any purpose whatsoever. What must be kept in mind is that the park was entirely the creation of Antone Martin and that after his death, it was given without any financial

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[3] Religious Freedom – Public Symbols, 336 ALR 3d 1256, 1260.

cost to the County in exactly the same condition it was theretofore maintained.

Such a gift could be well understood to be appreciated by county officials for the cultural, artistic, and economic benefits it offered to citizens of San Bernardino County. Located 67 miles from the core of county government and the urbanity of the highly populated residential and business sections of this sprawling county, the park is located in a desert area called Yucca Valley and serves as an oasis for the cultural appreciation for the sparse population in its immediate environs. Having acquired the park and its statues intact, it behooved the County to distance itself from the appearance of maintaining a publicly funded area dedicated to religious themes. A basis existed for sensitive members of the public to decry the gift because of the inclusion of replicas of New Testament figures.

County officials saw to it that none of the statues contained any labels identifying the depiction or linking any likeness to the Christian religion. No signs were in evidence anywhere that would suggest county endorsement of a religion. No religious meetings of any kind were permitted on the area and the name of the park was changed to one which attempted to make clear that the property was a memorial to the sculptor and his theme of peace, and not a place dedicated to one religion.

A fence was erected between the park and an adjoining church property to reflect the separate existence of the two. Brochures prepared by the County invited the park's public use by persons who possessed an appreciation for art and culture and it was openly available for

visitors on a 24-hour basis at no admission charge. From public funds, the County bore the expense of maintaining the park at the cost of approximately $5,500 annually – a rather minimal amount.

To determine the original purpose of the creation of the park by Martin, it is helpful to look at the man himself. We are told that he was not a man of great religious bent.[4] He is pictured as a man whose accent was on world peace and who used his artistic talents to give expression to peaceful themes. Salvador Dali was another artist who pointed part of his talents toward sending to the world a message of his abhorrence of war.[5]

In view of the park's cultural, historical and artistic value to the community and to all those who visit, I find that the County's ownership and maintenance of the park serves a primarily secular purpose.

Secular Effect

The second inquiry under *Lemon* is whether the government action had the effect of advancing or inhibiting religion. "The mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred." *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 125-126, 103 S.Ct. 505, 74 L.Ed.2d 297 (1982). An important concern of the effects test is thus "whether the symbolic union of church and state affected

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[4] Exhibit 19.

[5] Dali's *Face of War* is an example.

by the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the non-adherents as a disapproval, of their individual religious choices." *Grand Rapids School District v. Ball*, 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985). To this end, "government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." *Lynch*, 465 U.S. at 694 (O'Connor, J., concurring).

It is necessary to begin our analysis by determining what, if any, religious content exists in the display in question. Here, the park contains a collection of 36 larger than life-size statues and tableaus arranged in 13 scenes, primarily from the New Testament. One scene, for example, depicts a bearded man wearing a tunic or robe surrounded by similarly clad children. The artist, Martin, intended this tableau to represent Christ and children as described in the New Testament passages known as the Sermon on the Mount. Other scenes likewise depict themes taken from biblical narratives. Clearly, the park statuary, in content and appearance, reflect traditional Christian themes.

Noteworthy, however, is the lesser degree of sectarian symbolism attached to the statuary when compared to a creche or Latin cross which are so often the subject of cases and scholarly commentary. There is a critical difference between the sculptures in question, and the creche and Latin cross. The creche, and more so the Latin cross, epitomize Christian faith. In fact, the Latin Cross is the pre-eminent symbol of many Christian religions and clearly represents the key Christian concept of

the Crucifixion and Resurrection of Christ. The creche depicts one of the most familiar Christian scenes, namely, the birth of Christ, and is synonymous with Christmas, a national holiday. Here the several depictions of New Testament scenes while having prominent significance to Christianity, nonetheless have not attained the same level of religious notoriety with the general public as a cross or a creche.

According to *Lynch*, however, the court's analysis cannot stop with the conclusion that the statuary in question has religious significance. Rather, "the critical inquiry is whether, considered in its unique physical context," the statuary at issue in this case "communicates a message of government endorsement." *American Jewish Congress v. City of Chicago*, 827 F.2d 120, 127-128 (7th Cir. 1987). I conclude that it does not.

Here the physical presentation and appearance of the statuary support the court's conclusion. Far from being the mannequin-like figures in many Nativity scenes, each of the 36 statues is made of concrete and polished to a shining white by Martin's patented process. Because of the weight of these larger than life sculptures, steel support bars were implanted inside each statue. Each figure has an expressive, well-chiseled face, clearly defined hand gestures, and body positions composed to communicate the particular subject matter depicted.[6] Overall,

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[6] Martin, a noted local sculptor, required 9 years to complete all of the statues. A Life Magazine picture showed the transportation of one of the larger statues to its present site.

these sculptures are artistic works of an aesthetically pleasing nature, created by a skilled professional sculptor of local note.

Second, the setting or way in which the statues are presented conforms to the desert terrain.[7] The tableaus are spaced across the 3.5 mile park at intervals matching natural topographical features and plant growth. Aesthetically, the figures and terrain with its Joshua and cottonwood trees, compliment each other. As such, the setting is very much an important element in the overall artistry of the statues. The park as a whole retains the desert motif which historically characterizes this geographical area. It conforms to the cultural ambience of the surrounding desert community.

Plaintiffs contend that the park emits a direct religious impression from the signs and brochures denoting the park's relationship to Christ. The fact that the statues and tableaus are religious in nature, however, does not diminish the apparent artistic qualities of the statuary. This point is aptly supported by *Lynch* wherein the Court found that the religious symbolism of the Pawtaucket creche considered in it context, communicated no government endorsement. 465 U.S. at 681-682. The secular decorations surrounding the creche did not nullify its

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[7] The parties have supplied exhibits consisting of large photographs of the entire park area, and witnesses testified helpfully as to what they saw when they visited the park. From all this, I am able to adequately envision this facility as constituting a small-to medium-sized ground area in a desert setting with some houses and a sparse pocket of population in the near vicinity.

sectarian religious significance. Rather, the December holiday setting was the element that altered "what viewers may fairly understand to be the purpose of the display – [just] as a typical museum setting, *though not neutralizing the religious content of a religious painting, negates any message of endorsement of the content.*" *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring) (emphasis added).

Furthermore, the Court in *Lynch* observed that the "National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper, and paintings depicting the Birth of Christ, the Crucifixion, the Resurrection, among others with explicit Christian themes and messages." *Lynch*, at 676-677. The Court concludes that its very chamber is adorned with a mural of Moses and the Ten Commandments. *Id.*

While one may recognize the religious content of the statuary, its cultural and historical significance, as well as its artistry, denotes a neutral governmental role and does not thereby benefit or endorse religion. This desert display provides San Bernardino with a cultural landmark of note. Antone Martin Sculpture Park, as such, is more like a museum in content and display, than a public park. The park, as the record indicates, is 67 miles from the County seat and stands as a resting place for travelers or as a local center for the nourishment of tourists who have read of its collection of art pieces and desire cultural fulfillment. It has existed in its present form for 27 years under county ownership, and there is no tangible evidence of the County having used it as an endorsement of religion. In fact, the County has taken affirmative steps to disabuse the public of such notions.

Nothing that I have heard from the evidence convinces me that there is a subtle or any motive of governmental endorsement of religion. An objective person would not draw such an inference. I must lay this accusation only to the hypersensitive views of persons who are "looking under the rocks" for a cause of complaint. I therefore find that the County has not violated the effects prong of the *Lemon* test by owning and maintaining the park.

Entanglement

The third prong of the *Lemon* test prohibits governmental activity that excessively entangles the state with religion. The entanglement inquiry is divided into two discernible parts. First, the state must avoid administrative entanglement with religious authorities. The purpose of this prohibition is to avoid government entanglement in the administration of the church and to prevent church direction of government activities. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 123 (1982)

Second, impermissible entanglement may occur when government activity creates the danger of political fragmentation and divisiveness along religious lines. *Lemon*, 403 U.S. at 622-24. However, this inquiry is limited to the very narrow context of direct subsidy to religious institutions in most cases. *See e.g. Lynch v. Donnelly*, 465 U.S. at 683-685 (the Court observed that since the government's ownership and maintenance of the creche did not involve a direct subsidy to church sponsored schools or colleges, or other religious institutions, no inquiry into potential divisiveness is even called for).

The one case where the Court departs from this limited view is in *Grendel's Den*, 459 U.S. 116. There the court invalidated a Massachusetts ordinance that gave churches the power to veto the issuance of liquor licenses to commercial enterprises located within 500 feet of church premises. Even though the case did not involve direct subsidies, Chief Justice Burger, writing for the majority, expressed his concern that "[t]he challenged statute . . . enmeshes churches in the processes of government and creates the danger of 'political fragmentation and divisiveness along religious lines.'" *Id.* at 127 (quoting *Lemon*, 403 U.S. at 623).

Common factors identified by courts in resolving the administrative inquiry of the entanglement prong include, the government's monetary contribution to, maintenance of, and general involvement with the display. *Lynch*, 465 U.S. at 683-685. In *Lynch*, the Court found that the creche did not create excessive entanglement between religion and government, reasoning that no "expenditures for maintenance of the creche" had been necessary; and, that since the town owned the creche, valued at $200, the tangible material it contributes is "*de minimis*." *Id.*

Here, the County's expenditure of public funds to maintain and operate the park is minimal (approximately $5,500 per year). The operating budget of the park is certainly *de minimis*. Moreover, the use of funds to maintain the park are appropriate to fund the preservation of artistic statuary solely on its basis as art.

In *Lemon*, the Court also identified the need for government supervision and surveillance as indicia of

entanglement. The Court held that the supervision necessary to ensure that teachers in parochial schools were not conveying religious messages to their students would constitute the excessive entanglement of church and state.

> "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church." 403 U.S. at 619.

Plaintiffs also contend that there is excessive entanglement in part because there purportedly is no clear boundary of separation between the adjacent Evangelical Free Church and the subject park. First, a fence erected on the boundary between the two properties does substantially separate the church from the park. Secondly, as established at trial, there is no administrative or monetary interaction between the County government operating the park and the church.

Plaintiffs contend that defendants suffered entanglement in reviewing all park literature, signs and other property that may be placed there to ensure that it is not indirectly and/or incidentally religious in nature. On the one hand, the County will have to monitor and review the literature it prints regarding the park. It will also have to make sure that signs and other property it places on the park grounds do not advance religion. However,

these efforts nowhere near approach the level of state surveillance and supervision or administrative involvement which the courts have found violate the entanglement prong. By contrast, here the County would produce, disseminate or display the potentially religious literature and signs (i.e. the park brochures, placards). Thus, the County would monitor itself rather than monitor the conduct of a religious institution, or a religious school as in *Lemon*. Moreover, there was no testimony at trial that a need or desire on the part of the County existed to change the park brochures. In fact, it appears that changing brochures and signs in the park, would not require constant supervision because they do not require regular revision or changes.

In order to be successful on the political divisiveness ground, the County would have to either directly subsidize a religious school, church or institution, or, a religious institution must be acting as a government agency. *See Lynch*, 465 U.S. at 485. In the instant matter, there is no direct subsidy of church sponsored school, college or religious institution. In addition, the instant case does not present a *Grendel's Den* scenario where a religious institution is allowed to have direct and controlling authority of a government activity. In all, there is neither the administrative involvement nor political divisiveness of a degree to support this court finding excessive entanglement.

STATE CONSTITUTIONAL CLAIMS

The complaint also asks for relief under the provisions of California Constitution Article I, section 4 and Article XVI, section 5. California courts have utilized the

three prong *Lemon* test in analyzing alleged violations of section 5 of Article I, the state's parallel version of the U.S. Constitution's establishment clause. *Fox v. City of Los Angeles*, 22 Cal. 3d 792, 150 Cal. Rptr. 867, 587 P.2d 663 (1978); *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154, 34 Cal. Rptr. 387 (1963) As such, the above analysis of the First Amendment's establishment clause applies equally to section 5.

Furthermore, the recent case of *Okrand v. City of Los Angeles*, 2d. Civil No. BO 26035 (C.A. Cal.) filed January 26, 1989 by the Second Appellate District Division Five, considered many of the federal cases cited herein and affirmed a trial court decision holding that the city does not violate the establishment of the [sic] religion clause of the United States and California Constitutions when it permits display of an unlit menorah located near a decorated Christmas tree in the rotunda of its city hall. It cited the historic and cultural value of this Katowitz menorah which was crafted in the 19th century and was later rescued from the Nazi Holocaust, and is now owned by Chabad, an Orthodox Jewish organization. The Court said: "The fact (the menorah) also has high religious significance to Jews does not mean that its display does not also provide cultural and educational development to the citizenry at large." *Okrand* at 12. The menorah

displayed in the rotunda was accompanied by a sign describing the history of the Katowitz Menorah.[8]

In addition to the general establishment clause prohibition, section 4 has also been interpreted as disallowing "preference" for a religion or among religions. *Fox* 22 Cal.3d at 796. The California Constitution does not require, however, "that each religion always be represented." *Id.* " '[T]he government may depict objects with spiritual content, but it may not promote or give its stamp of approval to such spiritual content. *Allen v. Hickle*, 424 F.2d 948 (D.C.Cir. 1970)' " *Fox* 22 Cal.3d at 798; *see also Okrand*, 2d Civil No. BO 26035 at 12. As discussed fully above, the statuary park in question in effect has historical, cultural and artistic value. As such, the park, dedicated to world peace, would have no more demonstrative preference for a religion i.e. Christianity, than a

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[8] This sign read as follows:

THE KATOWITZ MENORAH

The 'FREEDOM MENORAH' was rescued from the flames of the Holocaust. Its former home was the Great Synagogue of Katowitz in Poland.

The Menorah was commissioned in the early 1800's. The eagles on the top of the Menorah are the 'Hapsburg Eagles.' They were incorporated in the design of the Menorah in appreciation and gratitude for the protection that the Hapsburg Empire granted the Jewish populance [sic].

The Menorah was crafted in Italy in the Italian Renaissance style. Each piece of the Menorah was individually hand-carved. The Menorah was designed, crafted and signed by the Artist 'Rosso.' "

government-owned museum displaying art with "spiritual content."

Section 5 of Article XVI of the California Constitution prevents any public resources to support "any creed, church or sectarian purpose." "The power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes." *California Educational Facility Authority v. Priest*, 12 Cal. 3d 593, 604, 116 Cal. Rptr. 361, 526 P.2d 513 (1974).

As detailed above, no direct aid, money or otherwise, goes *directly* to support religion in this case, nor has the County exhibited an impermissible sectarian purpose. Any incidental benefit to religion derived from this park compares to the minimal benefit derived from religious art presented in a government owned museum.

As such, I find that San Bernardino County's ownership of Antone Martin Memorial Park does not violate either Article I, section 4 nor Article XVI, section 5 of the California Constitution.

CONCLUSION

In light of the foregoing, the court concludes as a matter of law that the ownership and maintenance by the County of San Bernardino of a public park containing a collection of permanent statuary depicting replicas of New Testament figures does not violate the establishment clause of the United States Constitution nor does it violate either Article I, section 4 or Article XVI, section 5 of

the California Constitution. A judgment will be entered in accordance with this opinion.

SO ORDERED.

Date: February 6, 1989

/s/ David W. Williams
David W. Williams,
United States District Court Judge

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

RUBY HEWITT; RALPH WINANT; JERRY WEITZMAN; DARRELL BARKER and DENNIS MOLLOY, Plaintiffs, v. JOHN JOYNER; ROBERT HAMMOCK; JON D. MIKELS; BARBARA RIORDAN; and LARRY WALKER, in their official capacities as members of the San Bernardino County Board of Supervisors; YUCCA VALLEY PARKS AND RECREATION DISTRICT, Defendants.	CASE CV NO. 87-7605 DWW (JRx) JUDGMENT (Filed Feb. 6, 1989)

Pursuant to the Memorandum of Opinion filed concurrently herewith, the Court being advised,

IT IS ORDERED AND ADJUDGED as follows:

Plaintiffs' request for an injunction prohibiting the ownership, maintenance and display by the defendants and the County of San Bernardino of the park named Antone Martin Memorial Park, together with its collection of Biblical statues and tableaus is denied, *PROVIDED HOWEVER*, the defendants comply with the following terms and conditions:

a. That a suitable disclaimer be prominently displayed at the entrance of the park in letters readable from a district of 10 feet with a disclaimer which reads substantially as follows:

> "This park was created by sculptor Antone Martin as a Shrine of Peace. Upon his death, his heirs devised the park and its statues to the County of San Bernardino as a memorial to the sculptor and for the artistic and cultural appreciation of those who may want to visit the park. The park does not constitute an endorsement by the County of San Bernardino of any religion or religious doctrine."

b. The County of San Bernardino shall remove all racks and other receptacles which provide space for the positioning of brochures or magazines from outside sources which may be used to convey the notion to the public that the distributors of such papers have a connection with the park. Nothing in this provision shall prevent the County from distributing its own literature describing and advertising the park.

The Court shall retain continuing jurisdiction of this matter, pursuant to its equitable power to assure compliance with the conditions set forth herein.

DATED: This 6 day of February 1989.

/s/ David W. Williams
DAVID W. WILLIAMS,
UNITED STATES DISTRICT
COURT JUDGE

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUBY HEWITT; RALPH WINANT; JERRY WEITZMAN; DARRELL BARKER and DENNIS MOLLOY, Plaintiffs-Appellants, v. JOHN JOYNER; ROBERT L. HAMMOCK; JON D. MIKELS; BARBARA C. RIORDAN; and LARRY WALKER, in their official capacities as members of the San Bernardino County Board of Supervisors; YUCCA VALLEY PARKS AND RECREATION DISTRICT, Defendants-Appellees.	No. 89-55199 D.C. No. CV-87-7605-DWW ORDER (Filed Aug. 29, 1991)

Before: FERGUSON, NORRIS, and THOMPSON, Circuit Judges

The petition for rehearing filed by the defendants/appellees on August 14, 1991, together with the suggestion of a modification of the order on remand and the suggestion for a remand for further proceedings, is denied.

No. 91-878

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

JOHN JOYNER, et al.,
Petitioners,

vs.

RUBY HEWITT, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the Court of Appeals correctly held that governmental ownership, operation and maintenance of a public park dominated by 36 permanent, larger-than-life size statues of Jesus Christ and other biblical figures arranged in thirteen scenes from the New Testament depicting the life of Christ violates the religion clauses of the California Constitution, the meaning of which are well-setttled under state law, and where petitioner raised no abstention argument at trial or on appeal.

Whether the Court of Appeals erred in reviewing *de novo* the district court's decision of a mixed question of fact and law, or the district court's decision of a question of state law.

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No. 91-878

In the Supreme Court
OF THE
United States

October Term, 1991

JOHN JOYNER, et al.,
Petitioners,

vs.

RUBY HEWITT, et al.,
Respondents.

Petition For Writ of Certiorari
To The United States Court of Appeal
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Ruby Hewitt, Ralph Winant, Jerry Weitman, Darrell Barker and Dennis Molloy submit this brief in opposition to the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

The public parkland at issue prominently displays thirty-six statues organized into thirteen (13) scenes from the New Testament depicting prominent stories of the life of Christ, and other Christian symbols.[1] No other artistic displays -- secular *or* religious -- are located on this public land. The only other park facilities are two picnic areas and restrooms. ER:55.[2] For most of the park's history -- in fact, until well *after* the initial communication of the complaints which gave rise to this litigation -- the official name of this park was "Desert Christ Park." The park has never been recognized under any state or federal programs protecting historic landmarks.

After a one-day bench trial, the district court concluded that the government's maintenance and operation of Desert Christ Park did not violate the Establishment Clause of the

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[1] The religious nature of these displays is readily apparent from the photographs admitted at trial and appended to the Ninth Circuit's opinion. Petitioners' Appendix (hereinafter "Pet.App.") at pp. 28-37. Respondents have adopted Petitioners' references to the decisions below. The decision of the district court is designated herein as "Decision." The opinion of the appeals court is designated as "Opinion."

[2] The citations to the record below are designated herein as Plaintiffs' Exhibit ("PX") and Excerpts of Record on Appeal to the Ninth Circuit ("ER").

United States Constitution or the religion clauses of the California Constitution. The court recognized that "the park statuary, in content and appearance, reflect traditional Christian themes." Decision, Pet.App. at B-13. Nonetheless, the court concluded that the "aesthetically pleasing nature" of the sculptures minimized their constitutional infirmity. *Ibid.*

Originally dedicated by private parties on Easter Sunday, the District rededicated the park as Desert Christ Park in 1964, and maintained it as Desert Christ Park until May, 1987. After plaintiffs raised Establishment Clause objections, defendants officially changed the name of the park to "Antone Martin Memorial Park" (ER:3, 52), while simultaneously including the phrase "Formerly Desert Christ Park." ER:5. Even after the name change, petitioners continued to advertise the park as Desert Christ Park. ER:56; ER:14.

The park adjoins the Evangelical Free Church. ER:32, 39. Even now, there is no significant separation of the parcels by barriers, walls or fencing and at least 120 feet of the border between the two properties, the area on which many of the statues are displayed, remains completely unseparated. ER:24, 25, 32-34, 39-41, 59. Moreover, one of the scenes depicted in the park -- the bas relief Last Supper -- straddles the border between the park and the church. ER:25, 59.

The brochure produced and distributed by the County at the park until one year after this litigation began described scenes by their corresponding New Testament references: "Christ receiv[ing] a group of parents and children in the 'Children are Blessed' tableau [*Mark:10*]," the "Sermon on the Mount [*Matthew:5*]," "Christ and the Woman of Samaria [*John:4*]," "Christ in the Home of Lazarus [*John:4*]," "Christ kneel[ing] in prayer while [the Disciples] Peter, James and John sleep [*Matthew:26*]," "The Last Supper [*Matthew:26*]," "[a] large figure of the seated Christ in the 'Suffer Little Children to Come Unto Me' group [*Mark:10*]," "Judas Reflects," and "Christ's Blessing."[3]

In November, 1987, plaintiffs filed suit in U.S. District Court for the Central District of California, alleging that the ownership, maintenance and promotion of a permanent Christian theme park by the government violated the First Amendment to the federal Constitution and two religion

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[3] PX1 at 2; ER:2. The revised brochure now identifies the same permanent statues as "Woman of Samaria," "In the Home of Lazarus," "Garden of Gethsemane," "Suffer the Little Children" and "The Last Supper," removing all but two of the explicit references to Christ. ER:16. It also continues to describe and promote scenes and symbols on adjoining church property, including the Resurrection, Christ the Blessing and the lighted cross, without any indication that these scenes are not all one property owned and promoted by the government. ER:15-16, 62.

clauses of the California Constitution. At no time in the district court proceedings did defendants move to dismiss the state claims or to have the district court abstain from deciding the state claims.

The district court conducted a one-day bench trial during which it heard testimony from six witnesses, including two experts in the study of religion. Except for one witness, the District Park Director, all of the witnesses testified that they felt the park conveyed a message of endorsement of Christianity. ER:37, 42-47, 70-71, 87.

The court unsuccessfully pressed one expert, Professor Crossley, to say that the scenes were primarily reflective of peace and not religion. ER:82. Professor Crossley testified that if the scenes are viewed as images of peace, it is only because of a view equating Christian Gospel stories of Christ as a man of peace. ER:83. He also testified that "the New Testament is exclusively the book of the Christian faith and all the scenes depicted in the statuary are New Testament Scenes," ER:70-71, with no significance in most, if not all, other religions, ER:75-76.

Although recognizing that the statues have "*prominent* significance to Christianity," and reflect "traditional Christian themes" (Decision, Pet.App. at B-14 (emphasis supplied)), the district court nevertheless concluded, without any evidence or

testimony to support this finding, that because Antone Martin "was not a man of great religious bent[,]" the New Testament statues depicted peaceful scenes rather than religious ones. *Id.* at B-12. The court based its holding on an erroneous and unsupported conclusion that the New Testament was not well known and, thus, scenes depicting the life of Christ "have not attained the same level of religious notoriety with the general public as a cross or a creche." *Id.* at B-14.

Based on this unsupported assertion, the trial court concluded that the government's ownership and promotion of Desert Christ Park satisfied each prong of the test established by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Decision, Pet.App. at B-7-17. In its analysis of administrative entanglement, the court focused primarily on two factors: (1) the operating budget of the park, which the court termed "*de minimis*"; and (2) the lack of any clear boundary between the park and the church. Decision, Pet.App. at B-17-19.

Finally, the court addressed Article I, section 4 and Article XVI, section 5 of the California Constitution, concluding that the park is constitutional. In considering the state constitutional claims, the district court simply quickly referenced its *Lemon* analysis of the federal constitutional issues. *Id.* at B-20-23.

On appeal, both petitioners and respondents fully briefed the federal and state law questions. The Ninth Circuit panel unanimously held that the district court had misinterpreted state law decisions and reversed the lower court's decision on state constitutional law grounds. For the first time in their Petition for Rehearing, petitioners raised a claim of abstention. The petition for rehearing was denied.

REASONS FOR DENYING THE PETITION

I. THE COURT OF APPEAL CORRECTLY DECIDED AN ISSUE OF STATE LAW WHERE NO BASIS EXISTED TO SUPPORT *PULLMAN* ABSTENTION BY THE FEDERAL COURT AND WHERE ABSTENTION WAS NOT RAISED AT TRIAL OR ON APPEAL

A. The Court of Appeal Properly Reviewed the Decision of the District Court on State Law Grounds Where No Basis Existed and No Argument was Made for *Pullman* Abstention.

At the district court and on appeal, petitioners argued vigorously that the challenged permanent display of 36 statues depicting the life of Christ violated neither federal nor state constitutional provisions. Only after the federal courts' resources had been expended in full litigation of this case, and only after petitioners' judgment had been reversed on state law grounds, did petitioners suddenly urge that the appeals

court should have abstained from reviewing the state law claims under *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941).

This Court recently reiterated the well-established rule "that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have had jurisdiction." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 117 (1984) (citations omitted). This Court has also long held that where a federal court properly has jurisdiction of a case, it "may resolve a case solely on the basis of a pendent state-law claim, see *Siler [v. Louisville & Nashville Railroad Company]*, 213 U.S. [174], 192-193 [1909]. . . and that in fact the Court usually should do so in order to avoid federal questions. . . ." *Pennhurst*, 465 U.S. at 117, citing *Siler, supra*, at 193, and *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring); *Pennhurst, supra*, at 119 n.28. The rule announced in *Siler* was most recently cited by this Court with approval in *Finley v. United States*, 490 U.S. 545, 548 (1989). Thus, "where a case . . . can be decided without reference to questions arising under the Federal Constitution, that course is usually pursued and is not departed from without important reasons." *Siler, supra*, at 193.

In short, abstention from the exercise of federal court jurisdiction is "the exception rather than the rule." *Hawaii Housing Authority v. Midkiff,* 467 U.S. 229, 236 (1984). *See also Colorado River Water Conservation District v. United States,* 424 U.S. 800, 813 (1976). It has never been a "'doctrine of equity that a federal court should exercise its discretion to dismiss a suit merely because a state court could entertain it.'" *Id.* at 814, quoting *Alabama Public Service Comm'n v. Southern Railrod Co.,* 341 U.S. 361 (1951) (Frankfurter, J., concurring in result).

This case offers no reason for departing from these well-established rules for the simple reason that petitioners cannot meet the requirements for *Pullman* abstention.[4] Most fundamentally, this case does not involve an issue of unsettled state law. *Pullman,* 312 U.S. 496. Rather, the decision below rests on two provisions which have been a part of the California Constitution for well more than a century, and which consistently and repeatedly have been construed by the

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[4] Petitioners also contend that there is a conflict among the federal circuits on whether *Pullman* is required whenever a state constitutional claim is made, irrespective of how many times that provision has been interpreted previously by the state courts. *See* Petitioners' Brief at p. 22. That simply is not the rule of *any* circuit, nor of this Court, and none of the cases cited by petitioners support this inflexible rule.

California Supreme Court and the California courts of appeal, and in the opinions of several California attorneys general, to mandate a broader and more absolute separation of church and state than may be required under the federal Constitution. See Section IB at pp. 13-18, *infra*.[5] Thus, based on an expansive body of state appellate law, petitioners' argument

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[5]The California constitutional provisions at issue here have been interpreted by the California Supreme Court no less than five times, and by the appellate courts no less than nine times. In addition, both provisions have been the subject of numerous opinions issued by the state Attorneys General over the last century. *See, e.g., Ex Parte Newman,* 9 Cal. 502 (1852); *Evans v. Selma Union High School District,* 193 Cal. 43 (1924); *California Education Authorities v. Priest,* 12 Cal.3d 593 (1974); *Fox v. City of Los Angeles,* 22 Cal.3d 792 (1978); *California Teachers Assoc. v. Riles,* 29 Cal.3d 794 (1981); *Frohlinger v. Richardson,* 63 Cal.App. 209 (1923); *County of Los Angeles v. Hollinger,* 221 Cal.App.2d 154 (1963); *Johnson v. Huntington Beach Union High School District,* 68 Cal.App.3d 1 (1977); *Mandel v. Hodges,* 54 Cal.App.3d 596 (1976); *California School Employees Assoc. v. Sequoia Union High School District,* 67 Cal.App.3d 157 (1977); *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal.App.3d 1076 (1984), *cert. denied,* 469 U.S. 1052 (1985); *Okrand v. City of Los Angeles,* 207 Cal.App.3d 566 (1989); *Perumal v. Saddleback Valley Unified School District,* 198 Cal.App.3d 64, *cert. denied,* 488 U.S. 933 (1988); *Woodland Hills Homeowners Organization v. Los Angeles Community College District,* 218 Cal.App.3d 79 (1990).

for abstention fails the heart of this Court's test for *Pullman* abstention as the issues of state law are well-settled.[6]

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[6] When reviewing a request for *Pullman* abstention, the Ninth Circuit also considers two other factors: whether the suit touches a sensitive area of social policy and whether a definitive ruling on the state law issue would end the controversy. *See J.R. Distributors, Inc. v. Eikenberry,* 725 F.2d 482, 487-88 (9th Cir. 1984). Judged by these standards as well, abstention is inappropriate.

The decision of the appeals court in this instance does not impinge on an area of sensitive local social policy traditionally recognized as requiring abstention. In particular, there is nothing about this dispute that is uniquely local in nature. Nor is there anything about this dispute that suggests that the state courts are better equipped to weigh the constitutional values at stake. *Compare, Manny v. Cabell,* 654 F.2d 1280 (9th Cir. 1980) (conditions in local detention facilities); *Fields v. Rockdale County Georgia,* 785 F.2d 1558 (11th Cir.) *cert. denied,* 479 U.S. 984 (1986) (local land-use disputes); *National Capital Naturists v. Board of Supervisors,* 878 F.2d 128 (4th Cir. 1989) (local public nudity displays); *Posadas de Puerto Rico Association v. Tourism Company of Puerto Rico,* 478 U.S. 328 (1986) ("unique cultural and legal history" of United States territories and possessions).

Similarly, the state law question is not dispositive of the case. Because California's religion clauses have a meaning independent of their federal counterparts, a decision on state law would not "avoid, or substantially modify, the [federal] constitutional question presented." *Rindley v. Gallagher,* 929 F.2d 1552, 1555 (11th Cir. 1991). In any event, respondents would still be entitled to litigate their federal First

(continued...)

Despite the fact that petitioners satisfy none of the *Pullman* prerequisites, they now urge that the appeals court erred in deciding the state law questions. Petitioners make this argument on several grounds. First, they contend that the appeals court erred in not granting rehearing on *Pullman* abstention grounds once that court had issued its decision solely on state grounds because state law questions *now* predominate. Petitioner's Brief at p. 21. Petitioners' argument proves too much. Obviously, whenever a federal court decides a case, in which it properly has jurisdiction, on the state law questions only, state law claims could then be said to predominate. That does not mean, however, and petitioner makes no claim, that state law issues predominated this case generally or originally.

Petitioners also contend that, because there was no decision by the state supreme court *exactly* on all fours with the facts of this case, the Ninth Circuit could not decide the state law claims. Petitioners' Brief at pp. 20-21. Obviously, whenever a federal court decides a case that has not been decided on virtually the same facts by a state Supreme Court, this will be the argument a losing party will make. The critical

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[6](...continued)
Amendment claim if they were unsuccessful on their state law claims in state court.

issue is whether the governing state law principles are clearly established. As the Ninth Circuit recognized, the test was plainly satisfied here. *See* Point IB, *infra*.

B. The Court of Appeals Properly Applied Well-Settled California Case Law to Find That the Ownership and Promotion of a Christian Theme Park by the County Violated the More Stringent Separation Required by the California Constitution.

1. The Provisions of the California Constitution.

The California Constitution contains three sweeping, affirmative guarantees of religious liberty,[7] two of which are involved in this case. Taken together, these provisions deliberately express an even more complete separation of government and religion than is provided under the federal

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[7] Article I, sec. 4 mandates absolutely neutrality by government as it guarantees that religion may be practiced "without discrimination or preference," and prohibits any law "respecting an establishment of religion."

Article IX, sec. 8 prohibits "any sectarian or denominational doctrine . . . or instruction. . . directly or indirectly. . ." in the public schools.

Article XVI, sec. 5 prohibits government from dedicating public property to, or granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose."

Constitution.[8] These three provisions have been a part of California's Constitution for well more than a century, have been applied with vigilance by the California state courts. As a matter of state law, the independent provisions of the California Constitution are not dependent on the federal Constitution for their interpretation. California Constitution, Article I, sec. 24; *People v. Brisendine,* 13 Cal.3d 528, 551, 531 P.2d 1099 (1975).

a. Article I, Section 4.

Interpreting Article I, sec. 4 of the state Constitution more than 140 years ago, the California Supreme Court emphasized that

> When our liberties were acquired, our republican form of government adopted, and our Constitution framed, we deemed that we had attained not only toleration, but religious liberty in its largest sense -- a complete separation between Church and State.

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[8] Except for the "establishment of religion" language in Article I, sec. 4, paralleling the language of the First Amendment, none of these provisions "mirror or derive from any part of the federal Constitution." *Fox v. City of Los Angeles,* 22 Cal.3d 792, 800, 587 P.2d 663 (1978) (Bird, C.J., concurring).

Ex Parte Newman, 9 Cal. 502, 506-507 (1858). Thus, under the California Constitution, "when there is no ground or necessity upon which a principle can rest but a religious one, then the [California] Constitution steps in and says that you *shall not enforce it by authority of law.*" *Id.* at p. 513 (Burnett, J., concurring)(emphasis in original).

As originally enacted, Article I, sec. 4 provided that "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state." California Constitution of 1849, Art. I, sec. 4. In 1879, this provision was amended to its present form, replacing the concept of "allowing" religious freedom with a "guarantee" of these fundamental rights.[9]

The Attorney General of California has written that "[i]t would be difficult to imagine a more sweeping statement of the principle of governmental impartiality in the field of

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[9] Article I, sec. 4 states in full:

> Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace and safety of the State. The Legislature shall make no law respecting an establishment of religion. [¶] A person is not incompetent to be a witness or juror because of his or her opinions on religious beliefs.

religion" than that contained in the "no preference" clause. 25 Ops.Cal.Atty.Gen. 316, 319 (1955); Opinion, Pet.App. at A-12, citing *Fox v. City of Los Angeles,* 22 Cal.3d 792 (1978). California courts have interpreted this provision as being more protective of the principle of separation of church and state than the guarantee provided by the First Amendment. See *Fox, supra,* 22 Cal.3d at 800; *Okrand v. City of Los Angeles,* 207 Cal.App.3d 566 (1989). Under the "no preference" clause, "any appearance that the government has allied itself with one specific religion [is prohibited]." Opinion, Pet.App. at A-12 (citation omitted).[10]

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[10]The district court erroneously concluded that California courts apply this Court's *Lemon* test to analyze violations of Art. I, sec. 4 of the California Constitution. Pet.App. at B-20-21. In support of this position, the district court cited a California appellate court decision handed down nearly a decade before *Lemon*, and a 1978 California Supreme Court decision, *Fox,* which mentioned *Lemon* only in a concurrence. Opinion, Pet.App. at A-11, n.9.

Although California courts "may 'also consult principles of federal cases as they seem compelling guides to uncharted state grounds[,]'" *Feminist Women's Health Center, Inc. v. Philibosian,* 157 Cal.App.3d 1076, 1086 (1984), *cert. denied,* 470 U.S. 1052 (1985), California courts interpreting the *state* Constitution "should not view the *Lemon* test as absolute 'but as a touchstone with which to identify instances where the objectives of the establishment clause have been compromised.'" *Okrand, supra,* at 573 n.6.

b. Article XVI, Section 5.

Article XVI, sec. 5 of the California Constitution, also adopted in 1879, prohibits a union of church and state in language which has no federal origin. The clause provides, *inter alia,* that "Neither the Legislature, nor any . . . school district . . . shall ever . . . grant anything to or in aid of any religious sect, church, creed, or sectarian purpose; nor shall any grant or donation of . . . real estate ever be made by the . . . county . . . for any religious . . . or sectarian purpose whatever[.]"

This clause has been characterized as "the definitive statement of the principle of government impartiality in the field of religion." 37 Ops.Cal.Atty.Gen. 105, 107 (1961). The debates of the 1879 constitutional convention indicate "that the provision was intended to insure the separation of church and state and to guarantee that the power, authority, and financial resources of the government shall never be devoted to the advancement or support of religious or sectarian purposes." *California Educational Facilities Authority v. Priest,* 12 Cal.3d 593, 604 (1974).

Mindful of the framers' goal, the California Supreme Court has interpreted this provision broadly: "The section [ ] forbids more than the appropriation or payment of public funds to support sectarian institutions. It bans any official

involvement, whatever its form, which has the direct, immediate, and substantial effect of promoting religious purposes." *Priest, supra,* at 605 n.12. Under California law, a two-part test is applied to analyze whether government aid violates Article XVI, sec. 5. First, courts look to see "whether the aid is direct or indirect, and second whether the nature of the aid is substantial or insubstantial." *Sands v. Morongo Unified School District,* 53 Cal.3d 863, 913 (1991).[11]

2. Application of California Law by the Ninth Circuit.

Contrary to petitioners' assertion that the Ninth Circuit's reliance on principles of First Amendment jurisprudence demonstrates that California law is unsettled, in fact the Ninth Circuit's opinion rests squarely on the decisions of the California courts and their consideration of federal case law only as it serves as guideposts to interpreting state constitutional provisions.

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[11]Petitioners contend that the Ninth Circuit's citation to the *Sands* decision is somehow evidence of unsettled state law. Pet.Br. at pp. 15-16. This argument is simply without merit. The only references to *Sands* are to that court's citation of two earlier decisions, both by Justice Mosk of the California Supreme Court, articulating the test to be applied under Article XVI, sec. 5 of the California Constitution. *See California Educational Authorities v. Priest, supra,* 605 n.12 and *California Teachers Assoc. v. Riles,* 29 Cal.3d 794, 809 (1981).

Referencing the district court's reliance on *Lynch v. Donnelly,* 465 U.S. 668, 692 (1984), and the "typical museum setting," which negates a message of endorsement (Decision, Pet.App. at B-16), the appeals court considered the "pivotal" distinction between a museum and the permanent, static display of Christ statues at issue in this case. Opinion, Pet.App. at A-16. The appeals court reasoned that this Court's museum/park analysis had been addressed by the California Supreme Court twice in similar analogies comparing library shelves and public galleries with static displays of religious symbols on public building facades. Applying California case law, the appeals court opined that a "'typical' museum, like the city hall rotunda gallery in *Okrand*, may display a variety of artwork." *Id.* at A-17. In this setting, the sense of governmental endorsement of, or "preference" for, a particular religious message could be offset by the changing and diverse messages of the displays. *Okrand,* 207 Cal.App.3d at 574; Opinion, Pet.App. at A-17.

By contrast, the park at issue here is restricted by deed to the Christian artwork permanently displayed there. Thus, the appeals court correctly analogized the New Testament tableaus of Jesus Christ's life in this case to the physical restrictions of the lighted cross displayed on the Los Angeles City Hall in *Fox,* 22 Cal.3d 792. In *Fox,* the California

Supreme court drew a distinction between the library shelves setting previously considered by that court in *Evans v. Selma Union High School District,* 193 Cal. 43 (1924), in which the state could "easily . . . offset a potential for preference[,]" and the "much less tractable [city hall tower]." *Id.* at 797.

The appeals court concluded that the district court's opinion misinterpreted California law when it essentially ignored these state court decisions and applied this Court's test in *Lemon v. Kurtzman* to decide the question which should have been decided under nonanalogous provisions of state law. First, the appeals court found that controlling California case law did not apply the three-part test of *Lemon* to analyze whether a challenged practice violates the "no preference" clause of Article I, sec. 4. Opinion, Pet.App. at A-11 n.9.

Second, the appeals court concluded that, under the "no preference" religion clause of the California Constitution, even the presence of a legitimate secular purpose will not save a government practice which exhibits a "preference" for one religion under Article I, sec. 4 of the California Constitution. *Id.* at A-18. Without disputing the factual findings by the district court, and relying on several decisions of the California appeal courts, the Ninth Circuit concluded that these facts simply did not "change the clear religious message of the

park" and the expression of a preference for the Christian faith. *Id.* at A-19.

Turning to the second provision of the California Constitution at issue here, Article XVI, sec. 5, the Ninth Circuit reviewed two decisions of California appellate courts, *Frohliger v. Richardson,* 63 Cal.App. 209 (1923) and *County of Los Angeles v. Hollinger,* 221 Cal.App.2d 154 (1963), as well as the decision of the California Supreme Court in *California Teachers Assn. v. Riles,* 29 Cal.3d 794 (1981). None of these decisions, interpreting an independent and unparalleled provision of state law, rests on federal case law. In fact, and as the Ninth Circuit noted, the decision in *Riles* holds that Article XVI, sec. 5 of the California Supreme Court often compels a result that may be directly "contrary to decisions by the United States Supreme Court in similar cases." Opinion, Pet.App. at A-24.

The Ninth Circuit correctly concluded that the park display challenged here, with its explicitly and exclusively Christian theme, violates Article XVI, sec. 5 of the California Constitution. The government has lent its "power and prestige" by placing its imprimatur directly on the religious message of the life of Christ, as portrayed by the statues, and has provided a place to present that message in a core government function, public park land.

Here, the aid to religion which results from the County's explicit and emphatic promotion of the park's religious theme of Christ's life and the County's maintenance of the park is direct, immediate and substantial. As the Ninth Circuit recognized, under Article XVI, sec. 5, it makes no difference under California law that a valid secular purpose may in fact underlie the challenged conduct if the benefit to religion is anything more than incidental to a primary public purpose. *Priest, supra,* at 605. In fact, the existence of a simultaneous secular purpose, such as the purported interest in tourism or preserving historical objects, is "wholly irrelevant and immaterial" in analyzing a claim under Article XVI, sec. 5. *County of Los Angeles v. Hollinger,* 221 Cal.App.2d at 160-61. *See also* Opinion, Pet.App. at A-19-20.

II. THE COURT OF APPEAL CORRECTLY REVIEWED *DE NOVO* THE DISTRICT COURT'S DECISION OF A MIXED QUESTION OF LAW AND FACT AND THE DISTRICT COURT'S DECISION OF STATE LAW

A. The Court of Appeal Properly Engaged in *De Novo* Review of the Decision of the District Court on State Law.

In *Salve Regina v. Russell,* 449 U.S. ___, 111 S. Ct. 1217 (1991), this Court held that a court of appeals should review *de novo* the determination by a district court of an issue of state law. *Id.* at 1221. The decision by this Court in *Salve*

Regina recognized that "appellate courts that defer to the district courts' state-law determinations create a dual system of enforcement of state-created rights, in which the substantive rule applied to a dispute may depend on the choice of forum." *Id.* at 1222. Such a dual standard would defeat the Court's articulated goal of creating "doctrinal coherence" and eliminating "divergent development of state law among federal trial courts even within a single state." *Ibid.*

The opinion in *Salve Regina* expressly rejected the deferential standard of review of district court state law questions then followed by the majority of circuits and by the dissent in the Ninth Circuit. *In re Matter of McClinn,* 739 F.2d 1395 (9th Cir. 1984) (en banc). *Id.* at 1220-1221. This Court emphasized that the "'determination of state law . . . is a legal question, and . . . a party is entitled to meaningful review of that decision just as he is of any other legal question in the case, and just as he would have been if the case had been tried in a state court.'" *Id.* at 1225 n.5 (quoting C. Wright, A. Miller, and E. Cooper, *Federal Practice and Procedure,* § 4507, pp. 106-110 (1982).

In *Salve Regina,* this Court specifically considered the argument urged now by petitioners that application of a clearly erroneous standard to review of the district court's decision in this case might produce a contrary result to that

reached by the appeals court. Citing with approval the decision by the majority of the Ninth Circuit in *McClinn, supra,* this Court reaffirmed that "the difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' *Bose Corp. v. Consumers Union of the United States, Inc.,* 466 U.S. 485, at 501 [ ] [(1984)]. *When de novo review is compelled, no form of appellate deference is acceptable.*" *Salve Regina, supra,* at 1224 (emphasis supplied).

De novo review is clearly compelled in this instance. The opinion of the appeals court makes plain that its decision rests on a question of state law as it found "that the trial court misread the California Constitution and the state court opinions interpreting it[.]" Opinion, Pet.App. at A-9.

B. The Court of Appeals Properly Reviewed *De Novo* a Mixed Question of Fact and Law.

The "application of a rule of law to the established facts is reviewed *de novo* where the question requires consideration of legal concepts in the mix of fact and law." *United States v. McConney,* 728 F.2d 1195, 1202 (9th Cir.) (en banc), *cert. denied,* 469 U.S. 824 (1984). While appellate courts ordinarily are required to engage in the deferential review urged by petitioners and to give "due regard . . . to the opportunity of the trial court to judge the credibility of the witnesses" on factual questions (FRCP 52(a)), if "the question requires [the court]

to consider legal concepts in the mix of fact and law and to exercise judgment about the values that animate legal principles, then the concerns of judicial administration will favor the appellate court, and the question should be classified as one of law and reviewed *de novo.*" *McConney, supra,* at 1202, citing *Pullman-Standard v. Swint,* 456 U.S. 273, 289 n.19 (1982).

Despite this well-settled rule, petitioners now urge that the Court of Appeal erred in not applying a "clearly erroneous" standard to the factual findings of the district court. However, this deferential standard of review is appropriate only when the application of a rule of law to the facts of the case requires the court to engage in an analysis that is "essentially factual." *Pullman-Standard,* 456 U.S. at 288. This Court has defined an "essentially factual" inquiry as one based "on the application of the fact-finding tribunal's experience with the mainsprings of human conduct." *Commissioner v. Duberstein,* 363 U.S. 278, 289 (1960). No such analysis exists in the trial court's opinion in this case.

To the contrary, the injury alleged in this case "goes well beyond the facts of the case and requires consideration of the abstract legal principles that inform constitutional jurisprudence." *McConney, supra,* at 1203. Nonetheless, petitioners suggest that the appeals court engaged in *de novo*

review of the facts, separate from the law, when the court opined that "However, every religious display that is put in 'artistic' form, such as painting or sculpture, instead of the 'mannequin-like' form of the creche or cross is not saved from First Amendment scrutiny." Opinion, Pet.App. A-16; Petitioners' Brief at p. 24. Clearly, this statement represents the application of law to facts and is, therefore, a mixed question of law and fact properly reviewed by an appellate court *de novo.*

De novo review is particularly appropriate in this case where the evidence does not depend upon consideration of the "accuracy of witnesses' recollections" and their credibility. *McClinn,* 739 F.2d at 1398. Rather, the inanimate physical evidence concerning the government's written description and promotion of a Christian theme park, as well as photographic evidence of the statues and park grounds, was equally available to the district court and the court of appeal. Thus, there is no special "intuition" in this case which would require deference to the district court under FRCP 52(a).

CONCLUSION

For the reasons stated herein, the petition for certiorari should be denied.

Respectfully submitted,

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